diction,[100] and unjustifiably restricts their freedom in writing decisions.[101] Furthermore, because alternative holdings promote efficiency and finality of litigation, they should be encouraged rather than discouraged.[102] An alternative holding allows a lower court to resolve a case on all possible grounds, thus providing the appellate court with findings on all possible dispositions of the issues before it. If it turns out that one of the grounds is erroneous, the appellate court can affirm the judgment on the alternative ground,[103] thus promoting efficiency and finality. On the other hand, if the alternative holding is not sound, the appellate court must remand the case to the lower court for determination of the other ground[104]—a time-consuming procedure. Finally, alternative holdings should be encouraged because they contribute to the development of the jurisdiction's precedents and law, thus providing maximum guidance to the lower courts.[105]

A final systemic policy asserted by the Burger Court for limiting the exercise of federal habeas corpus jurisdiction is that it deprives society of the right to punish the guilty.[106] While it is true that the state can retry the successful habeas petitioner, often habeas relief comes years after the original trial. As time passes, memories fade and witnesses become difficult to locate. In such cases retrial is effectively impossible and the state is forced to simply let the petitioner go.[107] The limits placed by the Burger Court on habeas review have reduced this undesirable result.[108] The necessity of freeing guilty prisoners would be reduced even further if *Sykes* is applied to alternative holdings.

In *Fay v. Noia*,[109] the Warren Court noted several policies that support unlimited federal habeas review of alternative holdings. These policies did not survive the Burger Court's decision in *Sykes*, however, and therefore do not allow a federal habeas court to disregard a state procedural

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100. *See* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d at 440.

101. *See* Hall v. Wainwright, 565 F. Supp. 1222, 1233 (M.D. Fla. 1983), *aff'd in part, rev'd in part on other grounds*, 733 F.2d 766 (11th Cir. 1984).

102. *See* Phillips v. Smith, 717 F.2d 44, 46 (2d Cir. 1983), *cert. denied*, 104 S. Ct. 1287 (1984).

103. *See supra* notes 18-20 and accompanying text.

104. *See* Orr v. Orr, 440 U.S. 268, 274, 283 (1979); Indiana *ex rel.* Anderson v. Brand, 303 U.S. 95, 105 (1938).

105. *Cf.* Ramirez v. Jones, 683 F.2d 712, 718 (2d Cir. 1982) (Laval, J., concurring) (state court may reach the merits despite procedural default to provide guidance to lower courts), *cert. denied*, 460 U.S. 1016 (1983); R. Cross, *supra* note 19, at 41 (dictum provides guidance).

106. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Stone v. Powell, 428 U.S. 465, 490 (1976).

107. *See* Reed v. Ross, 104 S. Ct. 2901, 2907 (1984); Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Rules Governing § 2254 Cases in the United States District Courts, Rule 9 advisory committee note (1982) (appearing after 28 U.S.C. § 2254 (1982)); Friendly, *supra* note 43, at 146-47.

108. *See* Engle v. Isaac, 456 U.S. 107, 127-28 (1982); *see also* Stone v. Powell, 428 U.S. 465, 490 (1976) (possibility of freeing the guilty is a reason to bar fourth amendment claims from federal habeas review).

109. 372 U.S. 391 (1963).

holding. One of the policies advanced in *Noia* was that imprisonment in violation of a petitioner's constitutional rights, whether or not properly presented, was intolerable.[110] A second policy was that "conventional notions of finality in criminal litigation cannot be permitted to defeat the manifest federal policy that federal constitutional rights of personal liberty shall not be denied without the fullest opportunity for plenary federal judicial review."[111] A related concern of the Warren Court was that federal courts are better able to protect and are more receptive to the assertion of federal rights.[112]

These policies, however, retain little vitality in the wake of *Sykes* and subsequent habeas corpus cases. The Burger Court has consistently held that procedural defaults of federal rights should be respected absent a showing of cause and prejudice.[113] Therefore, *Sykes* and its progeny imply that it is entirely tolerable for a petitioner to be imprisoned despite the fact that his federal claim might have produced an acquittal or a reversal if it had been properly raised.[114] Similarly, by requiring a showing of cause and prejudice, the Burger Court has indicated that the policy of affording federal review of federal claims must be balanced against the countervailing policy of respecting valid state procedural rules.[115] Moreover, the Burger Court has explicitly rejected the idea that state courts are less able or willing to enforce federal rights.[116] Therefore, although applying the cause and prejudice test to alternative holdings offends the policies of *Noia*, those policies have been largely replaced, if not eviscerated, by *Sykes*.

The policies expressed by the Burger Court suggest the application of *Sykes* to alternative holdings. Under *Sykes*, the federal habeas court may no longer blithely overlook or overrule independent state procedural grounds. Accordingly, it should deny habeas review unless cause and prejudice is shown.

III. The Problem of the Unclear Holding: Should *Sykes* Apply?

Unfortunately, state courts often fail to identify clearly the bases for

110. *See id.* at 401-02; Friendly, *supra* note 43, at 149-50; *see also* Sanders v. United States, 373 U.S. 1, 8 (1963) (approving policy advanced in *Noia*).

111. *Noia*, 372 U.S. at 424.

112. *See* Kaufman v. United States, 394 U.S. 217, 225-26 (1969); Friendly, *supra* note 43, at 154-55. *But see* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976) (Burger Court rejecting argument that federal courts are better able to and more willing to protect federal rights).

113. *See, e.g.*, Reed v. Ross, 104 S. Ct. 2901, 2908 (1984); Engle v. Isaac, 456 U.S. 107, 129 (1982); Wainwright v. Sykes, 433 U.S. 72, 86-87 (1977); Francis v. Henderson, 425 U.S. 536, 542 (1976).

114. *See* Wainwright v. Sykes, 433 U.S. 72, 87, 88-89 (1977).

115. *See* Reed v. Ross, 104 S. Ct. 2901, 2907-08 (1984); Wainwright v. Sykes, 433 U.S. 72, 88 (1977).

116. *See* Stone v. Powell, 428 U.S. 465, 493 n.35 (1976).

their decisions.[117] In such a situation, should *Sykes* apply? Federal courts have not answered this question uniformly.[118] For instance, the Second Circuit in *Martinez v. Harris*[119] stated that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on the procedural ground, if the prosecutor argued procedural default to the state court, even if the constitutional claim was argued on the merits.[120] This assumption mandates application of *Sykes*, which is unsatisfactory for several reasons.[121] First, the Court in *Sykes* explicitly stated that the *Brown v. Allen* right to federal review of dispositive federal constitutional issues remained undisturbed.[122] Under *Martinez*, this personal right may be sacrificed on the altar of systemic interests even when no such interests exist or are unclear in a particular case.[123] The *Martinez* approach discounts the possibility that the state court's affirmance may be on the merits of the federal grounds alone, which would entitle the petitioner to federal habeas review under the rule of *Brown v. Allen*.[124] The court's reasoning in *Martinez* allows a state court to block federal habeas review by merely affirming without opinion in any case in which the prosecution raises the issue of procedural default.[125] This is impermissible.[126] The *Sykes* Court's reaffirmance of the rule of *Brown v. Allen* indicates that the Court did not intend to limit habeas review so radically.[127]

Second, the *Martinez* rule assumes that an adequate and independent state procedural ground exists whenever the prosecutor argues a procedural issue to the state court.[128] This approach is intolerable because, in

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117. *See supra* notes 31-32 and accompanying text. *Compare* Jerome Hat Corp. v. Lou Temco Uniforms, Inc., 74 A.D.2d 745, 745, 425 N.Y.S.2d 255, 255 (1980) (mem.) (affirming on the basis of the opinion below) *with* People v. Salerno, 74 A.D.2d 745, 745 (1980) (mem.) (affirming without opinion).

118. *Compare* County Court v. Allen, 442 U.S. 140, 147-54 (1979) (searching record and state law for procedural default) *with* Campbell v. Wainwright, 738 F.2d 1573, 1578 (11th Cir. 1984) (assuming procedural default when prosecutor argues merits and procedure alternatively) *and* Martinez v. Harris, 675 F.2d 51, 54-55 (2d Cir.) (same), *cert. denied*, 459 U.S. 849 (1982) *with* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (when state court record is unclear, federal courts will assume state court held on merits) *and* Williams v. Zahradnick, 632 F.2d 353, 357, 359-60 (4th Cir. 1980) (same).

119. 675 F.2d 51 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

120. *See id.* at 54.

121. *See* Martinez v. Harris, 675 F.2d 51, 55 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982).

122. *See* Wainwright v. Sykes, 433 U.S. 72, 87 (1977).

123. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

124. *See supra* note 123.

125. *See* Henry v. Wainwright, 686 F.2d 311, 314 & n.4 (5th Cir. 1982), *reversed on other grs.*, 463 U.S. 1223 (1983).

126. *Cf.* Michigan v. Long, 463 U.S. 1032, 1041 (1983) (similar reasoning in direct review) (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

127. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

128. *See* Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.), *cert. denied*, 459 U.S. 849 (1982). As a result of *Martinez*, any New York prosecutor may now assert a procedural

the event of a summary affirmance, it allows the prosecutor to defeat the petitioner's right to federal habeas review without proving that the state court relied on a procedural ground, and that the ground was both adequate and independent.

In the recent decision of *Hawkins v. LeFevre*,[129] the Second Circuit expressed its dissatisfaction with the *Martinez* rule and its unjust results.[130] In *Hawkins*, the prosecutor only argued the merits and the state appellate court affirmed the conviction without opinion.[131] On habeas review, the federal district court, citing *Martinez*, held that Hawkins was barred from habeas review due to a procedural default.[132] In reversing the district court, the *Hawkins* court stated that "[t]he scope of . . . *Martinez* . . . does not extend to all factual situations and, in particular, does not control the instant action."[133]

Curiously, the panel could have reached the same result by merely citing *Washington v. Harris*,[134] which provides that a federal habeas court should assume that a state court's summary affirmance of a conviction rests on constitutional grounds when the prosecutor argued solely on the merits.[135] The *Hawkins* Court's criticism of the district court's application of *Martinez* indicates that the Second Circuit may no longer be willing to apply automatically *Martinez* whenever the prosecutor argues a procedural default to the state appellate court. Indeed the court stated "[w]e choose not to extend *Martinez* and presume reliance by a state court on a procedural default, where it appears unlikely that the court rested its affirmance on that ground."[136] This statement may be a warning to state appellate courts to clearly identify the bases of their holdings, or risk federal habeas review.[137] Indeed, the court cited with approval Judge Newman's concern about the *Martinez* rule:

> What concerns me about the majority's inference from state court silent affirmance is the prospect that in some future case where a procedural default is arguable, but not clear, the [state appellate court] will silently affirm after deciding that there was neither procedural default

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ground for affirmance in the State's brief to the Appellate Division in order to block federal habeas review. However, the prosecutor's procedural argument may not be accurate. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 148 & n.6 (1979); Henry v. Wainwright, 686 F.2d 311, 314 (5th Cir. 1982), *reversed on other grounds*, 463 U.S. 1223 (1983).

129. 758 F.2d 866 (2d Cir. 1985).

130. *See id.* at 872-73.

131. *See id.* at 870 & n.6. "The Queens County District Attorney seemingly conceded that the trial judge's actions amounted to a constitutional violation, but argued that such error was harmless." *Id.* at 870.

132. *See id.* at 870.

133. *See id.* at 871.

134. 650 F.2d 447 (2d Cir. 1981), *cert. denied*, 455 U.S. 951 (1982).

135. *See id.* at 451-52.

136. Hawkins v. LeFevre, 758 F.2d 866, 874 (2d Cir. 1985).

137. *See id.* at 872 & n.8 ("[w]e continue to urge the state courts to remove the ambiguity in their summary affirmances by indicating, with citation to [the state rules of criminal procedure] . . . , their reliance on procedural default") (citation omitted).

> nor a valid claim on the merits, and we will then affirm the denial of habeas corpus relief because we mistakenly presume state court reliance on procedural default even though we think a constitutional error affecting substantial rights has occurred.[138]

In the past, the Supreme Court has attempted to solve the problem presented by unclear state opinions by searching the state court records—appellate and trial—to determine whether the state courts relied on a state procedural ground.[139] The major problem with this approach is that it is time-consuming[140] and therefore inefficient. This is a significant problem because one of the primary purposes of limiting habeas—relieving the burden on the lower federal courts[141]—is undermined by requiring federal habeas courts to search the trial and appellate records every time a state court fails to state clearly the basis of its holding.

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136. *Id.* at 872 (quoting Edwards v. Jones, 750 F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring)).

139. *See, e.g.*, County Court v. Allen, 442 U.S. 140, 147 n.5, 152 (1979); Wainwright v. Sykes, 433 U.S. 72, 74-75, 87-88 (1977); Irvin v. Dowd, 359 U.S. 394, 402-04 (1959). Some circuits have also applied this method. *See, e.g.*, Preston v. Maggio, 705 F.2d 113, 116 (5th Cir. 1983); Hockenbury v. Sowders, 620 F.2d 111, 113 (6th Cir. 1980), *cert. denied*, 450 U.S. 933 (1981).

140. *See* Batchelor v. Cupp, 693 F.2d 859, 864 (9th Cir. 1982), *cert. denied*, 463 U.S. 1212 (1983).

141. *See* Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring); Friendly, *supra* note 43, at 143-51; *Federal Habeas Corpus Review*, *supra* note 3, at 863 & nn.68-69. It is correctly pointed out that *Sykes* may not effectively relieve the burden of the lower federal courts. *See id.* at 863 n.69. The *Sykes* rule may be an attempt by the Court to retain the supervisory role of the federal courts, while responding to the concerns expressed by Justice Jackson in *Brown*, 344 U.S. at 537-41 (Jackson, J., concurring). In that case he wrote:

> [T]his Court has sanctioned progressive trivialization of the writ until floods of state, frivolous and repetitious petitions inundate the dockets of the lower courts and swell our own. Judged by our own disposition of habeas corpus matters, they have, as a class, become peculiarly undeserving. It must prejudice the occasional meritorious application to be buried in a flood of worthless ones. He who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search. . . .
>
> It cannot be denied that the trend of our decisions is to abandon rules of pleading or procedure which would protect the writ against abuse. . . .
>
> . . . It really has become necessary to plead nothing more than that the prisoner is in jail, wants to get out, and thinks it is illegal to hold him. If he fails, he may make the same plea over and over again.
>
> Since the Constitution and laws made pursuant to it are the supreme law and since the supremacy and uniformity of federal law are attainable only by a centralized source of authority, denial by a state of a claimed federal right must give some access to the federal judicial system. But federal interference with state administration of its criminal law should not be premature and should not occur where it is not needed.

Id. at 536-41 (footnotes omitted). However, when the petitioner's claim falls short of a miscarriage of justice and he cannot show good cause for his default, then his pleas, meritorious or frivolous, will not be heard. *See* Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977); Brown v. Allen, 344 U.S. 443, 541 (1953) (Jackson, J., concurring).

A second problem is that ad hoc federal determinations of the basis of state court decisions injure the policy of comity, a doctrine which requires predictable interaction[142] between state and federal courts. State courts should know how federal habeas courts will react to their decisions.[143] This is impossible if a case-by-case rule of interpretation is adopted.[144]

Finally, this approach is of limited use because it can lead to inaccurate results.[145] For example, if a state appellate court issues an affirmance without opinion,[146] it is impossible to determine which of several grounds asserted by the prosecution forms the basis of the appellate court's decision. Moreover, a search of the trial court record—always a time-consuming process—will be unavailing in many cases because trial courts often fail to address the issue either as a matter of procedure or on the merits.[147] Thus, the first state court to face the issue may be an appellate court or a state habeas court.[148] All of these reasons point to the inaccuracy inherent in this approach. Inaccurate results are intolerable when an individual's liberty is at stake.[149] In addition, such inaccuracies thwart the policy of comity[150] which the Burger Court has so zealously guarded.[151]

A third approach to the problem of unclear state holdings—one which avoids unduly burdening the federal courts—is for the federal habeas court to assume that the state appellate court relied on federal law whenever the basis of the state court's opinion is unclear.[152] This would pro-

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142. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

143. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1987).

144. *See id.*

145. *See* Michigan v. Long, 463 U.S. 1032, 1039-40 (1983); *see also* Irvin v. Dowd, 359 U.S. 394, 403 (1959) (lower federal courts erred in construing the state court opinion as resting on state grounds).

146. *See supra* note 117.

147. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 263 & n.19 (1973) (Powell, J., concurring); *see, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 74-75 (1977); Phillips v. Smith, 717 F.2d 44, 46 (2d Cir. 1983), *cert. denied*, 106 S. Ct. 1287 (1986); Thompson v. Estelle, 642 F.2d 996, 998 (5th Cir. 1981).

148. *See* Sumner v. Mata, 449 U.S. 539, 541-42 (1981) (state appellate court); Wainwright v. Sykes, 433 U.S. 72, 75 (1977) (state habeas appeal); Martinez v. Harris, 675 F.2d 51, 53-54 (2d Cir.) (state appellate court), *cert. denied*, 459 U.S. 849 (1982); Washington v. Harris, 650 F.2d 447, 450-51 (2d Cir. 1981) (state appellate court), *cert. denied*, 455 U.S. 951 (1982); Hockenbury v. Sowders, 620 F.2d 111, 115 (6th Cir. 1980) (state appellate court), *cert. denied*, 450 U.S. 933 (1981); Preston v. Maggio, 705 F.2d 113, 114-15 (5th Cir. 1983) (appeal to state appellate court from denial of state habeas petition).

149. *See* Townsend v. Sain, 372 U.S. 293, 312-13 (1963); *see also* 28 U.S.C. § 2254(d)(2), (3), (6), (8) (1982). One of the policies of *Sykes* is to promote accuracy of results at trial. *See supra* notes 96-97 and accompanying text. It would be ironic if the accuracy promoted by the *Sykes* limit on habeas review was then subverted by the application of *Sykes* by the federal habeas courts to murky state court determinations.

150. *See* Michigan v. Long, 463 U.S. 1032, 1039-41 (1983).

151. *See supra* notes 91-93 and accompanying text.

152. *See* White v. Estelle, 720 F.2d 415, 418 (5th Cir. 1983) (assuming state court held on the merits); Williams v. Zahradnick, 632 F.2d 353, 359 & n.6, 360 (4th Cir. 1980);

tect the petitioner's right under *Brown v. Allen*[153] to federal review, while avoiding unfair burden on the lower federal courts.[154] This approach would also produce consistent results by avoiding ad hoc interpretations of state court opinions.[155] Finally, this method is supported by the Supreme Court's decision in *Michigan v. Long*.[156]

In *Long*, the Court on direct review confronted the problem of determining the basis of a state court's holding.[157] One basis for the state court's holding could have been an adequate and independent state ground, but the other could have been federal.[158] The Supreme Court held that review is not barred unless the state court includes "a 'plain statement' that a decision rests upon adequate and independent state grounds."[159] This rule assumes that there are no adequate and independent state grounds "'when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law.'"[160] *Long* held that when it is not clear that adequate and independent state grounds support the judgment, the Supreme Court on direct appeal will assume that none exist.[161] Federal habeas courts should assume the same.

Arguably, applying the plain statement rule to state court opinions in the context of habeas review would allow the prisoner to obtain habeas review any time he merely asserted a federal claim. This argument is unpersuasive because it ignores the fact that if a valid state procedural ground exists and the state court's opinion clearly rests on that ground, the petitioner cannot secure habeas review by asserting a federal issue.[162] Requiring state courts to make a plain statement is a slight burden considering the prisoner's interest in securing federal habeas review.[163] A plain statement may be cursory; it does not require an in-depth written analysis.[164] Thus, the compromise of the state interest is slight in com-

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(same); L. Yackle, *supra* note 3, § 84, at 142-43 (Cum. Supp. 1985) (federal habeas court should a. *ume state court held on merits*).

153. 344 U.S. 443 (1953).

154. *See supra* notes 140-41, *infra* notes 163-65 and accompanying text.

155. L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). *See supra* note 121 and accompanying text.

156. 463 U.S. 1032 (1983).

157. *See id.* at 1037.

158. *See id.* The state court could have held on either state constitutional grounds or federal constitutional grounds on the issue of whether a search of defendant's car was illegal. *Id.* at 1043-44.

159. *Id.* at 1042.

160. *Id.* (footnote omitted).

161. *See id.*

162. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985). *See supra* notes 33-51, 58-116 and accompanying text.

163. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Smith v. Digmon, 434 U.S. 332, 333-34 (1978) (exhaustion requirement is satisfied if petitioner raises the claim in state court, regardless of whether the state court passes on it).

164. *See* Hawkins v. LeFevre, 758 F.2d 866, 872 (2d Cir. 1985); Edwards v. Jones, 720

person to the total compromise of the prisoner's rights if another rule were adopted.[165]

Moreover, the state court is the controlling actor in this scenario. It has complete control over the content of its opinion,[166] and the content determines whether the *Sykes* cause and prejudice standard applies.[167] Therefore, the state court, by drafting an opinion with a plain statement, can determine whether federal habeas review will be freely given; the prisoner does not have that control. If the state court does not clearly indicate the basis for its holding, the doubt should be resolved against the state—the controlling actor—and *Sykes* should not apply.[168]

Finally, applying *Long*'s plain statement rule to habeas review does not unduly offend the systemic policies of *Sykes*. Under the plain statement rule the policies of finality and efficiency would be harmed only when the basis of the state court's opinion is ambiguous.[169] When a state court clearly indicates that its decision is based on adequate and independent state grounds, federal review would be unavailable absent a demonstra-

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F.2d 751, 757 (2d Cir. 1983) (Newman, J., concurring); Henry v. Wainwright, 686 F.2d 311, 314 n.4 (5th Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983); 1 L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* County Court v. Allen, 442 U.S. 140, 153-54 (1979) (state court passed on merits of federal constitutional claim, despite brevity of its discussion of that issue); Martinez v. Harris, 675 F.2d 51, 54 (2d Cir.) (assuming procedural ground when no reasoning given), *cert. denied*, 459 U.S. 849 (1982).

165. *See* 1 L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

166. *See id.*

167. If the rationale is solely federal, then *Sykes* does not apply. *See supra* notes 52-57 and accompanying text. If the decision is based alternatively on federal and state grounds, *Sykes* should apply, though some circuits do not apply *Sykes* in this case. *See supra* notes 15-17, 58-116 and accompanying text. If the state ground is the sole basis, then *Sykes* applies. *See supra* notes 33-51 and accompanying text.

168. *See* 1 L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985); *cf.* Michigan v. Long, 463 U.S. 1032, 1042 (1983) (direct review of state court conviction). The Supreme Court in the context of direct review has stated:

> It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. . . . For no other course assures that important federal issues . . . will reach this Court for adjudication, that state courts will not be the final arbiters of important issues under the federal constitution, and that we will not encroach on the constitutional jurisdiction of the states.

Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940). In *National Tea* the Supreme Court vacated a state court judgment and remanded for a clarification of the basis of that court's decision. *See id.* at 556-57. A federal habeas court should not, however, employ that procedure. Vacating every state conviction in which the state court's reasoning was not clear would be contrary to the policy of comity. *See* Fay v. Noia, 372 U.S. 391, 467-68 (1963) (Harlan, J., dissenting). The problem is more easily solved by requiring a plain statement.

169. *See* Michigan v. Long, 463 U.S. 1032, 1041-42 (1983).

tion of cause and prejudice.[170] Further, to avoid federal habeas review, a state court need only briefly state in its opinion the adequate and independent state grounds.[171] Although it can be argued that placing requirements on the drafting of state courts' opinions offends comity, in these circumstances the offense is minimal. In the case of an unclear holding, the state court is asked to say more. It is not constrained from discussing federal law. Thus, applying *Long* to unclear holdings would not offend comity to the same extent that not applying *Sykes* to alternative holdings would.[172]

In *Long*, the Supreme Court discussed the effect of the plain statement rule on comity. First, the Court emphasized the problems presented when a reviewing court determines ad hoc whether a decision was based on adequate and independent state grounds.[173] The Court viewed that method as "antithetical to the doctrinal consistency that is required when sensitive issues of federal-state relations are involved."[174] The Court then stated that the plain statement approach "provide[s] state judges with a clearer opportunity to develop state jurisprudence unimpeded by federal interference, and yet will preserve the integrity of federal law. . . . '[It is important] that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by [the Supreme Court] of the validity under the federal constitution of state action.' "[175] Thus the Court indicated that the plain statement rule might actually promote rather than offend comity.

Because the alternatives to applying the plain statement rule to habeas corpus review are to accept ad hoc determinations by reviewing courts[176] or to assume that the claim is procedurally barred,[177] any injury to comity arising from applying *Long* to unclear state holdings is tolerable.[178] Although more friction may arise from applying *Long* in the habeas context than on direct review, this merely reflects the fact that habeas review by its very nature creates friction between federal and state courts.[179] Further, applying *Long* to unclear holdings furthers *Brown v. Allen*'s protection of state prisoners against violations of their federal rights by the states.[180] Finally, although applying *Long* to habeas review may com-

170. See *supra* note 24 and accompanying text; *cf. Long*, 463 U.S. at 1043-44 (rule applied in context of direct review).

171. See *supra* note 164 and accompanying text.

172. See *supra* notes 142-44 and accompanying text.

173. *See* Michigan v. Long, 463 U.S. 1032, 1039 (1983).

174. *Id.*

175. *Id.* at 1041 (quoting Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940)).

176. See *supra* notes 139-51 and accompanying text.

177. See *supra* notes 120-28 and accompanying text.

178. *See* L. Yackle, *supra* note 3, § 84, at 143 (Cum. Supp. 1985).

179. *See* Engle v. Isaac, 456 U.S. 107, 128 & n.33 (1982); Sumner v. Mata, 449 U.S. 539, 550 (1981); Norris v. United States, 687 F.2d 899, 901 (7th Cir. 1982); 17 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4261, at 600 (1978).

180. See *supra* notes 122-27 and accompanying text.

promise comity slightly, it also furthers comity since it is a consistent and predictable approach.

CONCLUSION

The *Sykes* cause and prejudice standard should be applied whenever a state court, solely or alternatively, relies on a procedural ground that constitutes an adequate and independent state ground. If the state court does not rely on a state ground, free habeas review as guaranteed by *Brown v. Allen* should be granted. When the basis of the state conviction is unclear, the federal court should apply the plain statement rule established by the Court in *Michigan v. Long*. When it is not clear that adequate and independent state grounds support the conviction, the federal habeas court should assume none exist and therefore grant habeas review.

These rules further the systemic policies enunciated by the Court in *Sykes*. Although applying *Long* to habeas review might slightly increase federal-state friction, this is tolerable. If *Long* is not applied to unclear holdings, the alternatives are to accept ad hoc determinations by reviewing courts, which can lead to even greater friction between the two court systems, or risk sacrificing the state prisoner's right to federal adjudication of his federal claim even though that claim is not barred by an adequate and independent state procedural ground.

James W. Dobbins

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

JOSEPH F SPANIOL, JR.
CLERK OF THE COURT

AREA CODE 202
479-3011

December 30, 1987

Jack Donatelli, Esquire
Assistant Attorney General
of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601

Re: 87-5677 - Warren Lee Harris v. Marvin Reed, Warden, et al.

Dear Mr. Donatelli:

On October 16, 1987, a petition for a writ of certiorari in the above case was filed in this Court to review an order of the United States Court of Appeals for the Seventh Circuit (No. 86-2032), dated June 12, 1987. Our records indicate that you were served with a copy of the petition.

The Court has directed this office to request that a response be filed in this case. Ten typewritten or otherwise reproduced copies of your response, together with proof of service thereof, should reach this office on or before January 29, 1988.

Kindly acknowledge receipt of this letter on the enclosed copy.

Very truly yours,

Joseph F. Spaniol, Jr.
Clerk

Enclosure

cc: Kimball R. Anderson, Esquire

Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5677

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WARREN LEE HARRIS,
Petitioner,

v.

MARVIN REED, Warden, and NEIL F. HARTIGAN,
Attorney General of the State of Illinois,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 16, 1987
CERTIORARI GRANTED MARCH 7, 1988

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Date	Item
December 15, 1977	Trial of Warren Lee Harris begins
December 21, 1977	Defense rests without presenting any witnesses, jury convicts Harris of murder
February 2, 1978	Harris sentenced to 50 to 100 years in prison
June 4, 1979	Illinois Appellate Court affirms Harris' conviction on direct appeal
July 17, 1979	Harris files petition for post-conviction relief in Circuit Court of Cook County, Illinois
January 31, 1980	Harris files *pro se* petition for habeas corpus in the United States District Court for the Northern District of Illinois, No. 80 C 531
March 19, 1981	Harris' motion for post-conviction relief in the Circuit Court of Cook County is denied
October 4, 1982	Federal district court adopts magistrate's recommendation that petition be dismissed for failure to exhaust state remedies
February 22, 1983	Illinois Appellate Court affirms the denial of Harris' post-conviction relief
April 3, 1983	Federal district court reinstates Harris' petition for habeas corpus now that Illinois Appellate Court has affirmed denial of post-conviction relief and allows Harris to file amended petition for habeas corpus

Date	Item
April 11, 1983	Harris files *pro se* amended petition for habeas corpus
April 8, 1985	Federal district court grants respondent's motion for summary judgment, except as to ineffective assistance of counsel claim, and appoints counsel to represent Harris on this issue
November 4, 14 and 26, 1985	Federal district court conducts trial on merits of ineffective assistance claim
May 30, 1986	Federal district court issues findings of fact and conclusions of law and denies petition; issues certificate of probable cause for appeal
June 17, 1986	Notice of appeal filed for appeal to the United States Court of Appeals for the Seventh Circuit
June 12, 1987	Seventh Circuit affirms district court decision
July 20, 1987	Seventh Circuit denies petition for rehearing *en banc*
October 16, 1987	Petition for Certiorari to the Seventh Circuit filed with the United States Supreme Court
March 7, 1988	United States Supreme Court grants Petition For Certiorari as to Question 1 presented by the Petition.

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—CRIMINAL DIVISION

Indictment No. 77-4796

Charge: Murder

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

WARREN HARRIS

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on Thursday, the 15th day of December, A.D. 1977, this clause came on for trial before the Honorable LOUIS B. GARIPPO, Judge of said court, and a jury, upon the indictment herein, the defendant having entered a plea of not guilty.

* * * *

December 19, 1977

We believe the evidence will also show that the police learned two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come into the

Area Four Police Headquarters, advised him of his rights and interrogated him.

At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.

The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that he had gone into that neighborhood to purchase narcotics, that he was across the street at the time of the shooting but that he didn't see the shooting itself.

At this point Melvin McWhorter is a chief suspect in the focus of the police investigation, and it is at this point, and some six weeks after the shooting, that the name Antonio Slater appears before the police. This is a man who, mind you, has never come forward to the police in six weeks after the shooting, it is also a person who none of the people interviewed by the police at the scene had named to the police as one of the men who had been in that area and who possibly had witnessed the shooting.

Antonio Slater gives his statement to the police and at that point the focus of the investigation shifts away from Melvin McWhorter.

* * * *

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

78-1193

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

vs.

WARREN HARRIS,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County

Honorable Louis B. Garippo Judge Presiding

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Following a jury trial defendant, Warren Harris, was convicted of murder and sentenced to the penitentiary for a term of 50 to 100 years. (Ill. Rev. Stat. 1977, ch. 38, par. 9-1.) On appeal he contends that he was not proved guilty beyond a reasonable doubt.

The deceased Earnest Howard was fatally shot about 10 p.m. on July 9, 1977, in the 1500 block of South Christiana Avenue on the West Side of Chicago. The chief prosecution witness was Antonio Slater.

Slater testified that he was driving on Christiana that evening when he had to stop a short distance behind a Buick automobile which was parked in such a way as to block the street. Slater heard a gunshot and saw 2 men

on the sidewalk in front of the Buick. The man who was facing this witness began to fall and the other man pushed him away, turned and then ran back to the Buick. As this man reached the passenger door, the beam of one of Slater's headlights shone on him about the waist and the street lights were illuminating the area. The man, whom Slater recognized as defendant, drew a gun and pointed it at him causing Slater to crouch down in his car. Defendant then entered the Buick, and it was driven away. Slater also drove off but did not report his presence at the scene to police for 6 weeks. Slater indicated that he knew defendant because he had seen him several times in a pool hall prior to the shooting and did not have any trouble seeing his face at the time of the shooting.

On cross-examination defense counsel sought to discredit Slater by reference to his signed statement given to police and his testimony at a preliminary hearing. Slater testified that he had driven a friend to the area of the shooting while the written statement indicated that he was on the way to the friend's house. It was also established that Slater's written statement showed the car defendant entered drove past Slater's car when leaving the scene of the shooting, while his trial testimony established defendant's car was driven away from Slater. Defense counsel also elicited that at the preliminary hearing Slater testified that his car was pulling up behind the Buick when defendant pointed the gun at him, but at trial Slater said that his car was stopped when this occurred.

Defense counsel also elicited variations in Slater's trial testimony when Slater first said the incident lasted only several seconds and then modified the length of the occurrence to several minutes. Also it was shown that Slater drove away as people gathered about the scene, although another witness, who discovered deceased shortly

after the shooting, saw no one in the area. Further the record indicates that Slater could not recall precisely when he had previously seen defendant.

Defendant now argues that the aforesaid inconsistencies in Slater's testimony and the circumstances, which permit only a weak identification, do not establish his guilt beyond a reasonable doubt. In considering defendant's contention we apply the well established rules that the identification of the defendant by one credible eyewitness, who views defendant under circumstances allowing an identification, is sufficient to sustain a conviction (*People v. Yarbrough* (1977), 67 Ill. 2d 222, 226, 367 N.E.2d 666); and the determination of defendant's guilt by the jury will not be set aside unless the evidence is so improbable as to raise a reasonable doubt of guilt (*People v. McDonald* (1975), 62 Ill. 2d 448, 456, 343 N.E.2d 489).

Applying these principles to the facts presented we discern no basis to disturb the jury's determination. The fact the beam of one headlight projected at defendant's waist and the area was illuminated by street lights would give Slater an opportunity to see defendant from the apparent short distance which separated them. There is nothing to detract from Slater's statement that he could see defendant's face. Moreover, Slater's prior familiarity with defendant would strengthen the identification (*People v. Watkins* (1976), 44 Ill. App. 3d 73, 77, 357 N.E.2d 1376; *People v. Farrar* (1972), 7 Ill. App. 3d 312, 314, 287 N.E.2d 475) thereby lessening the import of defendant's reference to the length of time Slater saw the assailant. The inconsistencies, which defendant notes between Slater's trial testimony and his version given at a preliminary hearing and recited in a written statement, are minor and not unusual; they do not destroy credibility but go only to the weight of his testimony. (*People v. Bell* (1972), 52 Ill. 2d 122, 125-126, 290 N.E.2d 214.) After review of the record, we

do not believe that Slater's testimony was improbable or that a reasonable doubt of guilt exists.

The appeal presents no issue of precedential importance and an opinion is unnecessary. We therefore dispose of the matter pursuant to Supreme Court Rule 23 (Ill. Rev. Stat. 1977, ch. 110A, par. 23): the judgment of the circuit court is affirmed.

Dated at Chicago, Illinois, this 4th day of June, 1979.

ENTER:

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

/s/ [Illegible]
Justice

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

(Title Omitted in Printing)

ORDER DISPOSING OF APPEAL UNDER SUPREME COURT RULE 23

Defendant, Warren Harris, appeals from an order granting the State's motion to dismiss his petition for post-conviction relief, contending that he was improperly denied an evidentiary hearing.

The record shows that defendant was tried before a jury, convicted of murder, and then sentenced to serve 50 to 100 years in the penitentiary. That judgment was affirmed on direct appeal pursuant to Supreme Court Rule 23. *People v. Harris* (1979), 71 Ill. App. 3d 1113.

The facts set forth in the order affirming his conviction reveal that defendant fatally shot Earnest Howard about 10 p.m. on July 9, 1977. The chief prosecution witness was Antonio Slater who testified that he was driving on Christiana Avenue in Chicago that evening when a parked car blocked his path. He heard a gunshot and saw two men standing on the sidewalk in front of the parked car. The man facing Slater began to fall and defendant pushed him away, turned and ran back to the car. As he reached the passenger door, the beam of one of Slater's headlights shone on defendant above the waist. Defendant then drew a gun and pointed it at Slater, causing Slater to crouch down in his car. Defendant entered the parked car and was driven away. Slater also drove off but did not report his presence to the police for about six weeks. He indicated that he knew defend-

ant because he had seen him several times in a pool hall and was able to see his face after the shooting.

At trial, defendant was represented by an assistant public defender. During cross-examination of Slater, he attempted to impeach Slater by showing the discrepancies between his signed statement and his testimony at a preliminary hearing, by showing inconsistencies in his trial testimony, and raising questions about where he had previously seen the defendant.

In his direct appeal defendant was represented by the office of the State Appellate Defender, and the sole issue presented for review was whether defendant had been proved guilty beyond a reasonable doubt. When this issue was resolved against him, defendant filed a *pro se* petition for post-conviction relief. (Ill. Rev. Stat. 1979, ch. 38, pars. 122-1 *et seq.*) Private counsel was appointed to represent him on the petition and an amended petition was prepared and filed.

In that petition defendant alleged that he was denied his right to the effective assistance of counsel in that his trial counsel failed to properly prepare for trial because he did not interview or call two witnesses who saw two men running from the scene; Melvin McWhorter was identified as one of these men. Defendant also alleged that his trial counsel failed to call George Williams as a witness to testify that he was the man with McWhorter on the night of the shooting; that counsel failed to seek disclosure of the identity of the informant who provided police with the name of the State's only identification witness five weeks after the shooting; that counsel failed to call a rebuttal witness to impeach Slater's testimony that he voluntarily went to the police; that counsel failed to offer into evidence a stipulation that would have perfected the impeachment of Slater on the issue of his turning onto Christiana from 16th Street; that counsel failed to investigate and seriously consider defendant's poten-

tially viable alibi defense, or contact alibi witnesses; and that counsel failed to inform defendant that no evidence or alibi would be offered in his defense until the morning on which the defense was to go forward and then ignored defendant's objection to this procedure.

Attached to the petition was the affidavit of Melvin McWhorter who stated that he was acquainted with the deceased and bought narcotics from him and that he was present when he was shot by George Williams. He also averred that he is acquainted with Slater, whom he knew to be a drug addict, and that he was not present in the area on the night deceased was killed.

The affidavits of Jewel, Mary and Genise Conner, friends of the defendant, were also attached in which they averred that defendant was sick in bed on the day of the shooting in the home of Jewel Conner. Jewel also stated that she notified defense counsel of this potential alibi defense and that she was available as a witness but was never contacted.

The defendant also attached the answer to discovery filed by his trial attorney and various police reports which were also filed in conjunction with the incident. These reflected interviews with two persons who identified McWhorter as one of two men seen fleeing from the incident, an interview with McWhorter in which he denied any knowledge of the shooting, and an interview with Williams.

The State filed a motion to dismiss alleging, *inter alia*, that the doctrines of *res judicata* and waiver were applicable in light of the affirmance of the judgment on direct appeal. The defendant's petition was dismissed without an evidentiary hearing and this appeal followed. Defendant now maintains that an evidentiary hearing should have been held to determine the merits of his allegation of incompetence of counsel or, in the alternative, that the State should have been required to file an answer.

The State initially responds that defendant has waived his right to assert a claim of the incompetence of his trial counsel because he failed to raise this issue in his direct appeal.

It is well settled that where a direct appeal is taken from a conviction, the judgment of the reviewing court is *res judicata* as to all issues actually raised, and those which could have been presented, but were not, are considered waived. (*People v. French* (1970), 46 Ill. 2d 104, 262 N.E.2d 901.) Where, however, the allegations in a post-conviction petition are based on facts which do not appear in the record, they are not barred by the doctrine of *res judicata*. *People v. Edmonds* (1979), 79 Ill. App. 3d 33, 398 N.E.2d 230.

In the instant case, defendant alleges incompetence because his trial counsel failed to investigate or call several witnesses on his behalf, to perfect impeachment of the State's chief witness, or to investigate and present an alibi defense. Our examination of the record in this appeal indicates that, except for the alibi witnesses, the identity of the persons set forth by the defendant and their statements to the police were of record, and it also appears that the stipulation alluded to by defendants was contained in the trial record. As such, these matters could have been raised in defendant's direct appeal. (See *People v. Churchill* (1981), 92 Ill. App. 3d 1006, 416 N.E.2d 395.) In this regard we find it noteworthy that defendant's appellate counsel was not affiliated in any way with his trial counsel, and there is also no indication that defendant expressed any dissatisfaction with his trial counsel at the time the appeal was filed or raised any question regarding the competency of his trial counsel. See *People v. Stewart* (1978), 66 Ill. App. 3d 342, 383 N.E.2d 1179.

Competency is determined from the totality of counsel's conduct at trial. (*People v. Murphy* (1978), 72 Ill.

2d 421, 381 N.E.2d 677.) In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney, and that this incompetence produced substantial prejudice to him without which the result of the trial would probably have been different. *People v. Talley* (1981), 97 Ill. App. 3d 439, 422 N.E.2d 1084.

Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present the alibi witnesses and to present an alibi defense. The affidavits show that the Conners made themselves available to defense counsel but were never called as witnesses to testify as to defendant's whereabouts at the time of the shooting.

The determination of whether or not to call a witness is generally regarded as a matter of trial strategy, and, even if it were error on the part of trial counsel not to introduce this testimony, errors in strategy and judgment on the part of counsel do not render the representation incompetent. *People v. Pendleton* (1982), 104 Ill. App. 3d 1104, 433 N.E.2d 1076, and cases cited therein.

It appears on this record that counsel's strategy was to rely on the State's inability to prove the defendant guilty beyond a reasonable doubt as indicated in his answer to discovery. The facts gleaned from the order affirming defendant's conviction indicate that counsel decided to emphasize the discrepancies in the testimony of the State's only eyewitness. To this end he vigorously cross-examined Slater in an attempt to impeach his testimony and point out the inconsistencies in his statements. The fact that an attorney in the better light of hindsight might have handled the trial in a different manner is not an indication of trial counsel's incompetence. *People v. Elder* (1979), 73 Ill. App. 3d 192, 391 N.E.2d 403; see also

People v. Martinez (1982), 104 Ill. App. 3d 900, 433 N.E.2d 981.

Before an evidentiary hearing is required in a post-conviction proceeding, a petitioner must make a substantial showing of a violation of a constitutional right (*People v. Farnsley* (1973), 53 Ill. 2d 537, 293 N.E.2d 600), and a reviewing court will not reverse the determination of the trial court in that regard unless it was manifestly erroneous (*People v. Murphy* (1979), 78 Ill. App. 3d 132, 397 N.E.2d 68).

Viewing defendant's petition and supporting affidavits in light of the record, we do not believe that he has established that the representation he received at trial resulted in substantial prejudice without which the outcome would probably have been different. Accordingly, we affirm the judgment of the circuit court of Cook County.

Dated at Chicago, Illinois, this 22nd day of February, 1983.

BUCKLEY, P.J., McGLOON and GOLDBERG, JJ.

UNITED STATES DISTRICT COURT
N.D. ILLINOIS, E.D.

No. 80 C 513

UNITED STATES OF AMERICA, *ex rel.*
WARREN LEE HARRIS,
Petitioner,

v.

MARVIN REED,
Respondent.

April 8, 1985

MEMORANDUM OPINION AND ORDER

GETZENDANNER, District Judge:

This action is before the court on the petition for a writ of habeas corpus, 28 U.S.C. § 2254, of Warren Lee Harris. The parties have briefed respondent's motion for summary judgment. Moreover, the parties have provided the court with additional materials from the state court record. For the reasons stated below, respondent's motion for summary judgment is granted in part and denied in part. An evidentiary hearing is required to determine the merits of the one outstanding claim. The court therefore will appoint an attorney to aid Harris in this evidentiary hearing.

Factual Discussion

On December 21, 1977, after a three-day jury trial, Harris was found guilty of murder on the testimony of

the state's one occurrence witness, Antonio Slater. According to Slater, Harris shot and killed one Earnest Howard on the night of July 9, 1977, near the area of 16th and Christiana streets in Chicago, Illinois. On February 2, 1987, Harris was sentenced to serve 50 to 100 years in the state penitentiary.

At trial, Public Defenders Todd Musberger and Kathy Kuhlen represented Harris. In her opening statement on December 19, 1977, Kuhlen made the following remarks:

> At this time, I would like to mention one of the names that Mr. Fuenty [prosecutor] brought up and also another name that he didn't mention that I think will figure quite prominently in this trial, that other name is Melvin McWhorter, also known as Buster on the street.
>
> To understand the importance of Mr. McWhorter and of Antonio Slater, it is necessary to give you a brief review of the police investigation in this case. During the days immediately following the shooting of Earnest Howard the police talked to a number of people who were present in the area of 16th and Christiana, people who lived there and also to relatives of Earnest Howard. They learned that Earnest Howard was a narcotics dealer who sold in that neighborhood at 16th and Christiana.
>
> * * * *
>
> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.

> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that . . . he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Trial Transcript 31-33.) Kuhlen continued, discussing how Slater's statement to the police switched the focus of suspicion to Harris from McWhorter, and asking the jury to examine carefully Slater's credibility.

The state first called Howard's father to testify that he identified his son's body at the morgue. This was not objected to, although the identity of the victim was not in dispute. Harris does not claim error from this failure.

The state next called Maurice Williams, who knew the victim as "Pete." Williams came to Pete's aid soon after the shooting by calling the police. Williams testified that he noticed McWhorter (Buster) among the crowd of persons that had gathered around the scene of the shooting. (Tr. 46, 51.)

On December 20, 1977, the state examined Officer Joseph Michello, one of the police officers that appeared on the scene after the shooting. Musberger's cross-examination centered on the location of Howard's body upon his arrival on the scene.

The state next called Antonio Slater, who explained on direct examination that he arrived at the scene of the shooting while driving south on Christiana (a one-way southbound street) at about 20 m.p.h. Slater testified that he crossed the intersection of 15th and Christiana and when he was about 12 feet behind a parked vehicle

that was blocking his way, he heard a shot and noticed two men standing near each other. He witnessed the man with his back to Slater push the other man, who fell. This occurred about 12 feet in front, or south, of the car that was parked in front of Slater. The man who had pushed the other man down, turned and ran to the parked car, turned and faced Slater, pulled up a pistol at Slater, and jumped into the passenger section of the car. (R. 71-76.) When the pistol was pointed at him, Slater crouched. (R. 79.) The car pulled away. (R.76.)

When asked to identify the man who apparently shot Howard, Slater responded, "Wayne" and in court identified Harris as Wayne. (R. 77-78.) Slater testified that he knew Wayne from a poolroom at 13th and Kedzie. He testified:

> I don't actually know [Harris], I know him by people speaking to him, you know, but about two years I have seen him up there . . . . about once or twice a month.

(R. 78.) Slater was able to see Wayne because gold street lights along Christiana were lit and because his headlights were shining on Wayne's waist. (R. 81.)

Slater was next asked about going to the police station. He testified that he went there in August 1977 with his uncle and talked to Investigator Tom Shine. Slater testified that he had not been contacted before he went to the station. (R. 84.)

Musberger then cross-examined Slater. He first pointed out that it took Slater six weeks to go to the police with his story. (R. 89.) He highlighted that Slater had changed his reason for having been in the area of 15th and Christiana on that night. Musberger also highlighted inconsistencies between Slater's pretrial statements and his trial testimony. Musberger also impeached Slater's story that he had seen Wayne several times over the previous two years. (R. 109-110.)

After Slater, two other witnesses were called by the prosecution on the issue of the cause of death. On December 21, 1977, the defense rested without putting on any evidence. (R. 130.) The portions of the opening argument suggesting that McWhorter or others might have been responsible for the shooting were ignored completely. Later that afternoon, the jury returned a verdict that Harris was guilty of murder.

After sentencing, Harris was represented by an Assistant Defender, Nancy Abrahams, on direct appeal. Abrahams presented one argument on appeal, namely, that the evidence was insufficient constitutionally to support a conviction for murder. (Respondent's Attachment, filed 2/15/85, Brief for Appellant.) On June 4, 1979, the Appellate Court found the evidence constitutionally sufficient and affirmed the conviction. (*Id.* at Order Disposing of Appeal under Supreme Court Rule 23 [direct appeal]).

On July 17, 1979, Abrahams, as Harris's stand-by counsel, filed Harris's pro se petition for post-conviction relief. (Harris's Motion in Opposition, filed 11/21/85, at 8-9.) In the post-conviction petition, Harris raised two issues: (1) ineffective assistance of trial counsel, and (2) newly discovered evidence. The public defender's office was granted leave to withdraw, and Attorney Loretta Hall Hardiman assumed prosecution of the petition. She filed an amended post-conviction petition, dropping the newly discovered evidence claim.

The lower post-conviction court held a hearing on March 27, 1980. A second hearing on the amended petition occurred on March 19, 1981. (The transcript is attached as Exhibit 3 to Harris's Motion to Reconsider, filed 10/18/82.) The court denied the petition at the close of that hearing, without convening a hearing in which to take testimony. *Id.* at 27. Assistant Appellate Defender Bruce Mosbacher represented Harris on appeal

of this decision. The denial of post-conviction relief was affirmed on February 22, 1983. (Respondent's Answer and Memorandum, filed 10/21/83, Order Disposing of Appeal Under Supreme Court Rule 23 [post-conviction].)

Claims for Relief

Harris first claims that he was unduly prejudiced by the state court delay in disposing of his post-conviction petition. According to Harris, certain alibi witnesses (the Connor family) moved to Mississippi in late 1979 and Z. Mary Connor died in December 1979. (Original Petition, attachment, at 1-2.) This loss of evidence, caused by the alleged inexplicable delay, is offered as support for the claim that Harris is now in custody in violation of the federal constitution.

Harris' second claim for relief is based on alleged ineffective assistance of counsel. According to Harris, his trial counsel failed properly to investigate witnesses and to impeach the testimony of Antonio Slater. Harris listed several errors in his amended petition for habeas corpus, all of which were raised in his amended petition for post-conviction relief:

> 1. Counsel failed to interview or call as witnesses Investigators B. Peck and L. Sykes to impeach Slater. These witnesses would testify that "the victim was shot in the gangway," although Slater testified the victim was shot on Christiana street. (Amended Petition for Habeas Corpus Item H.)
>
> 2. Counsel failed to interview or call as witnesses Alice Riles or Leroy Carter. Both saw two men running from the scene of the shooting at the time of the shooting. Both identified McWhorter as one of the two men. Riles indicated in the police report that she could identify the other man by appearance. Police records contained this information.

3. Counsel failed to investigate or call as a witness George Williams. Williams would testify that he was with McWhorter the night of the shooting, that he knew the victim through a long history of drug dealings, and that Harris was not at the scene of the shooting. Police records contained this information.

4. Counsel failed to call police investigator Shine or any other investigator to impeach Slater's testimony that he did not hang out in the area of the shooting and that he had never been in that area. Shine also could have impeached Slater's statement that he came to the police station voluntarily, although Shine's report indicates an informant provided Slater's name and the police contacted Slater. Counsel also did not seek the identity of the informant.

5. Counsel failed to offer into evidence the agreed stipulation that "would have perfected the impeachment of the witness Slater [sic] trial testimony that he turned off Christiana from 16th Street and witness [sic] the crime." (*Id.* at Item O.)

6. Counsel failed to call or investigate residents of 13th and Kedzie, who could testify that no pool room existed at that corner, thereby impeaching Slater's testimony that he knew Harris as Wayne from "seeing him every month at a poolroom on 13th and Kedzie." (*Id.* at Item Q.)

7. Counsel failed to interview, investigate, or call as witnesses four alibi witnesses: Jewel Connor, Z. Mary Connor, Genise Connor, and Charles Thomas. Harris provided counsel with the names and addresses of the witnesses. These witnesses would have testified that Harris was ill and in bed at the Connor's home on the night of July 9, 1977 and was later hospitalized on July 13, 1977 for that same

illness. (See Affidavits attached to original petition for habeas corpus.)

8. Counsel failed to call any of the doctors who treated Harris at Cook County Hospital to testify and corroborate his alibi witnesses' story that he was hospitalized on July 13, 1977 with an illness that would indicate he was also ill on July 9, 1977.

All of the names contained in this list of alleged errors, except the names of the alibi witnesses, are contained in the police records and in the state's list of potential witnesses. (See Harris's Requested Records and Information, filed 2/25/85 [Answer to Discovery].) According to Harris's amended post-conviction petition, he did not learn that counsel would present no defense evidence until December 21, 1977, the last day of trial. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 1 at p. 3 [Amended Petition for Post-Conviction Relief].)

Harris's third contention is that his detention is unconstitutional because newly discovered evidence establishes his innocence. This evidence is an affidavit executed by Melvin McWhorter, who would testify that Slater was not present at the scene of the shooting and that he witnessed George Williams shoot the victim. Harris notes that Riles, Carter, and Williams corroborate some of these facts, including that Williams and McWhorter were together that night and that McWhorter was seen leaving the scene of the shooting. (The court notes that, accepting as true Harris's counsel's opening statements, this would be McWhorter's third story. The first was that he knew nothing about the shooting; the second, that he was across the street from the shooting but saw nothing; and the third, that he saw Williams shoot Howard.)

Harris's final claim is that the evidence was constitutionally insufficient to convict him of murder beyond a

reasonable doubt. He claims Slater's testimony was so inconsistent as to be incredible.

Legal Discussion

I. Post-Conviction Delay

Harris's first claim for relief stems from alleged prejudicial delay in the disposition of his Illinois petition for post-conviction relief. This claim was raised in Harris's original habeas corpus petition, which was received by the Clerk of the United States District Court on January 31, 1980 and filed on February 8, 1980. Harris had previously filed, on July 17, 1979, a petition for post-conviction relief. (Stand-by counsel Abrahams' affidavit evidences that she filed the petition on that date. *See* Abrahams Aff., attached to original petition for habeas corpus.)

Starting in early 1980, therefore, Harris had proceedings concerning the validity of his conviction pending simultaneously in both federal and state court. While District Judge Joel Flaum considered various issues regarding Harris's petition (basically mootness and exhaustion), Harris attempted to get his claims resolved in state court as well. The post-conviction petition was denied by the lower state court on March 21, 1981. On October 4, 1982, the federal district court dismissed Harris's petition for failure to exhaust available state remedies, because Harris at that time had an appeal of the post-conviction decision pending in the Illinois Appellate Court. On April 4, 1983, Judge Flaum granted Harris's motion to reinstate his action and file an amended petition for habeas corpus, as exhaustion had been accomplished by that date.

Harris complains that his petition for post-conviction relief was "in limbo" for 7½ months before any action thereon was taken by the Illinois courts. Since one of his four alibi witnesses died in late December 1979 and all had moved to Mississippi by the end of 1979, Harris

contends that the delay in processing his post-conviction petition was unconstitutionally prejudicial.

To the extent that Harris's claim based on post-conviction delay sought relief from the exhaustion requirement in habeas cases, that claim is clearly moot. Inordinate delays in state procedures, such as post-trial motions, appeals, and post-conviction remedies, may exclude exhaustion in circuits where exhaustion is not considered a jurisdictional requirement. *See McGee v. Estelle*, 722 F.2d 1206, 1209-11 (5th Cir. 1984); *Baldwin v. Lewis*, 442 F.2d 29, 32-33 (7th Cir.1971). The remedy for inordinate delay is normally immediate consideration by the federal court of petitioner's federal claims, an effective waiver of the exhaustion requirement. *See Dixon v. State of Florida*, 388 F.2d 424, 426 (5th Cir. 1968); *Rhemark v. Wade*, 540 F.2d 1282, 1283 (5th Cir. 1976) (direct appeal); *cf. United States ex rel. Smith v. Twomey*, 486 F.2d 736, 738-39 (7th Cir.1973), *cert. denied*, 416 U.S. 994, 94 S.Ct. 2408, 40 L.Ed.2d 773, *reh'g denied*, 417 U.S. 959, 94 S.Ct. 3089, 41 L.Ed.2d 677 (1974). However, because Harris has exhausted his state appellate and post-conviction remedies, such a claim would now be moot.

Harris may also be arguing that the Illinois delay effectively deprived him of the right to present his constitutional claims in a federal forum, as evidence was lost during the delay. Harris is thus not attacking the adequacy of Illinois post-conviction procedures per se—an effort that would probably not rise to a constitutional violation, *see Williams v. State of Missouri*, 640 F.2d 140, 143-44 (8th Cir.), *cert. denied*, 451 U.S. 990, 101 S.Ct. 2328, 68 L.Ed.2d 849 (1981)—but the effect of Illinois post-conviction procedures on the federal right of habeas corpus. At least one court has hinted that an inordinate delay, in that case twelve years, may violate petitioner's rights, even absent any trial error. *Codispoti v. Howard*, 589 F.2d 135, 142 (3d Cir. 1978).

Assuming that the Illinois delay in disposing of Harris's post-conviction petition was inordinate and could violate his right to a full and fair consideration of his federal habeas claims in federal court, however, Harris's claim appears to be without merit. The death of one of four alibi witnesses, Z. Mary Connor, alone is not prejudicial, since her testimony would be cumulative (all were in the same dwelling with Harris on the night of the shooting; three, including the deceased witness, executed affidavits to that fact). Moreover, while the witnesses now live out of state, Harris does not claim that they are inaccessible should their testimony be needed. On the present record, therefore, Harris has suffered no prejudice from the delay.

The court doubts that post-conviction delays, absent a showing of prejudice, alone could justify release of a petitioner for federal habeas corpus relief. Even if such a delay by itself could be reason for release, however, the delay in this case could not have violated Harris's federal due process rights. This delay appears to have been the result of misplacement of Harris's post-conviction petition. Moreover, cases examining delays in state procedures involve time periods far in excess of seven months. The 7½ month delay in this case is not so egregious that, absent prejudice, it could justify issuance of the writ for violation of Harris's federal due process rights.

Respondent's motion for summary judgment is granted as to Harris's claim of post-conviction delay.

II. Ineffective Assistance of Counsel

A. Waiver

As was discussed above, the one issue presented on direct appeal by Assistant Appellate Defender Nancy Abrahams was the lack of sufficient evidence on which to convict. The court's own examination of Harris's and

the state's legal memorandum on direct appeal confirms this fact. Moreover, the Illinois Appellate Court's opinion on direct appeal addressed only the sufficiency of the evidence, and not the other issues raised by Harris in his petition for federal collateral review.

The original and amended post-conviction petitions raised the issue of ineffective assistance of trial counsel. The court is provided with the transcript of the March 19, 1981 lower court post-conviction hearing. The transcript reveals that Harris' attorney Hardiman and the state vigorously disputed the merits of the ineffective assistance of counsel claim. (Harris's Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 6-27 [Transcript].) However, the parties also discussed the possibility that Harris waived his right to raise the issue through failure to preserve it on direct appeal. (*Id.* at 3-4, 7.) Moreover, the hearing court was aware of the waiver issue, as demonstrated by this comment:

> My question as a judge in this case is to determine whether or not, as a result of the trial that was had, the defendant had a fair trial, . . . and if not, any matters that were improperly handled, those matters should have been raised on the basis of an appeal [*sic*].

(Id. at 26.) In any case, the hearing court also appeared to reach the merits of the ineffective assistance claim:

> On the basis of [the fact that the alibi witnesses were Harris's friends], I have considered all aspects, I have heard your arguments, I have heard the arguments of the state, and it is the opinion of the court that the defendant has been properly represented, that he had been given proper consideration on his appeal, both by the appellate court and the supreme court, and accordingly, this court is

> hereby denying your petition, and it is hereby dismissed.

(*Id.* at 27.)

In affirming the denial of Harris's post-conviction petition, the Illinois Appellate Court noted that in Illinois, arguments raised in post-conviction proceedings but not preserved on appeal are barred by *res judicata* if the arguments are based on facts that are of record. *See People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist. 1979). The Court then pointed out that all facts, except those relating to the alibi witnesses, were reflected in the trial court record.

After making this point, the Court did not conclude that Harris had waived his ineffective assistance claims in full, but instead went on to consider the merits of those claims. The Court's manner of addressing the claims indicates that it considered the merits of the ineffective assistance arguments with respect to the alibi witnesses as well as with respect to of-record evidence:

> Competency is determined from the totality of counsel's conduct at trial. [Citation omitted.] In order to establish that he was deprived of his right to the effective assistance of counsel, defendant must demonstrate that his appointed counsel was actually incompetent, as reflected in the performance of his duties as a trial attorney . . . .
>
> Defendant also contends that he was denied the effective assistance of counsel because his trial counsel failed to interview and present alibi witnesses and to present an alibi defense.

(Respondent's Answer and Memorandum, filed 10/21/83, "Order Disposing of Appeal Under Supreme Court Rule 23", at 5-6 [post-conviction].) (emphasis added.)

The Court continued to discuss the standards of effective assistance and to evaluate the quality of the assist-

ance provided in Harris's case. For example, the Court noted trial counsel's vigorous cross-examination of Slater, which highlighted certain inconsistencies between his trial testimony and his pre-trial statements. The Court also pointed out that trial counsel has great discretion in determining which, if any, witnesses to call in his or her client's defense. According to the Court, Harris's counsel could reasonably and competently have chosen to rely on cross-examination of state witnesses and the state's failure to sustain its burden in prosecuting Harris. (*Id.* at 6.) The Court concluded that "the representation [Harris] received at trial [did not result] in substantial prejudice without which the outcome would probably have been different." (*Id.* at 7.)

It is clear that in Illinois, failure to raise on appeal the issue of ineffective assistance of trial counsel results in waiver of that issue for post-conviction review. *People v. Edmonds*, *supra*; see cases collected in *United States ex rel. Devine v. DeRobertis*, 754 F.2d 764, 766 n. 1 (7th Cir. 1985). These authorities indicate that an exception to the waiver rule occurs when the basis for the claim is not found in the record.

In *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the Supreme Court held that a petitioner could not litigate collaterally in federal court an issue that state procedural law prevented from being presented to the state appellate courts. This ruling was extended by the Seventh Circuit in *United States ex rel. Spurlock v. Wolff*, 699 F.2d 354, 356 (7th Cir. 1983), to a failure to present properly preserved trial objections on appeal.

Under *Sykes*, such a "waiver" of the right to present an issue to the federal courts on collateral review may be overcome only by a showing of "cause" and resulting "prejudice." Cause and prejudice are flexible concepts,

satisfaction of which changes with the circumstances of a particular petitioner. *Clay v. Director, Juvenile Division, Department of Corrections*, 749 F.2d 427, 433-34 (7th Cir. 1984). Moreover, under circumstances constituting a "miscarriage of justice," a *Sykes* waiver, not cured by satisfaction of the cause and prejudice test, may be ignored. *Id.*

Sometimes a state court will consider the merits of an issue that may not have been properly preserved by timely objection or appeal. Where a state court ignores a procedural default and reviews the substantive merits of what would otherwise be a waived issue, federal courts must review the merits of that issue in a petition for habeas corpus. *United States ex rel. Williams v. Franzen*, 687 F.2d 944, 951, (7th Cir. 1982). However, where a state court has clearly reached both the merits of the waiver question and the substantive merits of the improperly raised issue, the Seventh Circuit has found that absent a showing of cause and prejudice, *Sykes* bars federal collateral review. *Farmer v. Prost*, 721 F.2d 602, 605 & n. 5 (7th Cir. 1983); *United States ex rel. Veal v. DeRobertis*, 693 F.2d 642, 650 (7th Cir. 1982); *see Jentges v. Milwaukee County Circuit Court*, 733 F.2d 1238, 1243 n. 1 (7th Cir. 1984).

In the present case, the Illinois Appellate Court made clear, and respondent agrees, that the issue of ineffective assistance of counsel was not waived as to facts not in record. According to the Appellate Court, those facts include the affidavits of the four alibi witnesses. This court notes additionally that the record appears to contain no indication (1) that Harris might have been confined to Cook County Hospital shortly after the shooting as a result of a serious illness, (2) that no poolroom existed at 13th and Kedzie, and (3) that McWhorter swore that George Williams committed the shooting. Respondent argues that to the extent that Harris's ineffec-

tive assistance of counsel claim depend on trial counsel's omissions indicated in the record, the claim was waived.

The court's review of the trial and appellate opinions on post-conviction review persuades it that the Illinois state courts ignored any waiver by Harris of his right to rely on "record" omissions. The question is whether Harris's case is more like that presented by *Williams* or by *Farmer*. If more like the former case, then federal collateral review is proper with respect to all omissions raised in the amended post-conviction petition also raised in the pending petition for habeas corpus.

In *Williams*, the Illinois Appellate Court "note[d] at the outset [that] the State is correct in its argument [that] the defense counsel waived [this issue] by failing to object to the trial court's [ruling]." *People v. Ross*, 63 Ill.App.3d 884, 20 Ill.Dec. 688, 692, 380 N.E.2d 897, 901 (1st Dist. 1978). The Court followed this statement with citations to three Illinois Supreme Court cases supporting the state's waiver argument. *Id.* However, the Court never expicitly stated that the issue was waived. The Court then continued to reach the merits of the claim, finding that the improperly raised issue was substantively without merit. According to the Seventh Circuit in *Williams*, this treatment of what would otherwise be a waived claim allowed federal collateral review of that claim. *Williams*, 687 F.2d at 951.

In contrast, the *Farmer* Court, on appeal from denial of a post-conviction petition, explicitly found that the petitioner had waived his claim before examining the issue presented. *Farmer*, 721 F.2d at 605. Similarly, the Court in *Veal* distinguished an express ruling on procedural default from a mere discussion thereof for purposes of applying the *Sykes* bar to collateral review. *Veal*, 693 F.2d at 659. An express ruling on procedural default, presented as an independent and alternative ground for denying relief, prevents federal collateral review.

The treatment of Harris's claim is strikingly similar to that involved in *Ross*. In the February 22, 1983 denial of Harris's post-conviction appeal, the Court simply noted that waiver appeared to operate, but then continued to treat the merits of the improperly raised issue. Both the *Harris* and the *Ross* courts did not appear to make two rulings in the alternative, but rather to note a procedural default and then ignore it, reaching the merits instead. The court is therefore persuaded that Harris's ineffective assistance of counsel claim may be presented to the federal court with respect to all omissions raised in the amended post-conviction petition.

B. Merits of Ineffective Assistance Claim

The United States Supreme Court has recently issued two opinions concerning the scope of the sixth and fourteenth amendment right to effective assistance of counsel. *Strickland v. Washington*, —— U.S. ——, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *United States v. Cronic*, —— U.S. ——, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The Court noted the universally accepted principle that the federal constitution guarantees "reasonable effective assistance." *Strickland*, 104 S.Ct. at 2062. A convicted defendant, to prevail on an ineffective assistance of counsel claim, must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 2065.

The *Strickland* Court stressed that "[c]ounsel . . . has the duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process," *id.*, and that "counsel's function . . . is to make the adversarial testing process work in the particular case," *id.* at 2066. Reasonable professional judgments must support counsel's actions. If counsel did not conduct a complete investigation of a particular matter, a reasonable professional basis for not conducting that inves-

tigation will defeat an ineffective assistance claim. *Id.* at 2066.

In addition to demonstrating an unreasonable professional error by counsel, a defendant must also show that the error had an effect on the judgment:

> The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

Id. at 2067. The court went on to describe the circumstances under which prejudice is presumed, *see id.* at 2067; *United States v. Cronic*, 104 S.Ct. at 2046-2047 & n. 25, and under which prejudice must be affirmatively shown by defendant, *Strickland*, 104 S.Ct. at 2067-68. Where defendant must demonstrate prejudice, as in this case, the test that must be satisfied is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." When a petitioner challenges his conviction, "the question is whether there is a reasonable probability that, absent the error, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 2069.

Defendants challenging the constitutional sufficiency of their counsel must prove both parts of this test. Thus, the *Strickland* Court made clear that a finding that one part was not established obviates a decision regarding the other part. *Id.* A court may also review counsel's performance by addressing the prejudice component first, or vice versa. *Id.* When examining counsel's performance, " 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reason-

able professional assistance' that might be considered sound trial strategy." *Rogers v. Israel*, 746 F.2d 1288, 1294 (7th Cir. 1984) (citing *Strickland*, 104 S.Ct. at 2065-66); *E.g., McKinney v. Israel*, 740 F.2d 491, 492 (7th Cir. 1984) (court addressed only prejudice element and finding lack thereof, declined to reverse denial of writ); *Crisp v. Duckworth*, 743 F.2d 580 (7th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1221, 84 L.Ed.2d 361 (1985) (finding of incompetent counsel performance without resultant prejudice, court affirmed denial of writ).

Regarding proper *defense* counsel preparation, the Seventh Circuit has explained:

> It is undisputed that a defense counsel "should make reasonable investigations into all defenses," *United States v. Zylstra*, 713 F.2d [1332] at 1338 [(7th Cir. 1983)], and that such investigations encompass the interviewing of witnesses. *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc) (plurality opinion).

Arrowood v. Clusen, 732 F.2d 1364, 1370 (7th Cir.1984). In *Crisp v. Duckworth*, the Seventh Circuit examined extensively claims of ineffective assistance of counsel at the investigation and trial preparation stages, the stages implicated in the present petition. In that opinion, the Court stressed again the importance of pretrial investigation to reasonably competent representation:

> Effective representation hinges on *adequate* investigation and pre-trial preparation. *See United States ex rel. Spencer v. Warden, Pontiac Correctional Center*, 545 F.2d 21, 24-25 (7th Cir.1976) (as corrected) (mere appearance of in-court effectiveness cannot compensate for inadequate pre-trial preparation). . . . Investigation may help an attorney develop or even discover a *defense*, locate witnesses, or unveil impeachment evidence. Though there may

> be unusual cases when an attorney can make a rational decision that investigation is unnecessary, as a general rule an attorney must investigate a case in order to provide minimally competent professional representation. [Citations omitted.]
>
> . . . .
>
> We do not agree that police statements can generally serve as an adequate substitute for a personal interview. *See United States v. Tucker*, 716 F.2d [756] at 583 & n. 17 [(9th Cir. 1983)]; *United States v. DeCoster*, 487 F.2d [1197] at 1204 [(D.C.Cir. 1973)] ("a defense attorney . . . should interview not only his own witnesses but also those that the government intends to call").

743 F.2d at 583-584. It is true that a defense attorney's discretion is broad, and that so-called "trial strategy" may excuse omissions that otherwise would appear inexcusable. However, the Seventh Circuit clearly recognized in *Crisp* that

> [t]hough there may be instances when the decision not to contact a potential defense witness is justified, [citation omitted], an attorney who fails even to interview a readily available witness whose noncumulative testimony may potentially aid the defense should not be allowed automatically to defend his omission simply by raising the shield of "trial strategy and tactics," [citation omitted]; *see also Davis v. Alabama*, 596 F.2d [1214] at 1217 [(5th Cir. 1979)] ("An attorney does not provide effective assistance of counsel if he fails to investigate sources of evidence which may be helpful to the defense."); *United States v. DeCoster*, 487 F.2d at 1201 (A court should not "second guess strategic and tactical choices made by trial counsel. However, when counsel's choices are uninformed . . . a defendant is denied the effective assistance of counsel.")

743 F.2d at 584.

In this case, Harris claims that his counsel failed to interview and to call numerous witnesses. Some of the omissions could have led to impeachment, such as Slater's claim that he voluntarily appeared at the police department, that he did not hang around the crime scene area, and that there was a poolroom on Kedzie and 13th where he frequently saw Harris and knew him as "Wayne." In a case dependent solely on eye witness identification, where the identification is bolstered by the witness's prior knowledge of the defendant, this impeachment is important. Counsel's alleged failure to investigate certain witnesses could also amount to ineffective assistance of counsel. For example, Harris claims that his counsel did not interview Carter and Riles, who were present on the first day of trial. These two witnesses identified two men running from the scene of the crime. One of the men was McWhorter, according to both witnesses, and the other's identity is unclear. Riles told the police she could identify the other if shown his picture. Perhaps Riles and Carter could have identified Williams as the man running from the scene with McWhorter (Williams claims he was with McWhorter that night). This testimony could have been offered by the defense as an exculpatory version of the shooting. Finally, alibi witnesses, willing and available, were not called and the hospital records allegedly were not checked.

Taking Harris's allegations as true, his trial counsel's failure to conduct the above-described investigations would fall below the standard of reasonably competent representation. It is axiomatic that a defense counsel must interview witnesses to the crime and alibi witnesses. Trial counsel should also interview witnesses such as Riles and Carter, who did not witness the shooting but who observed areas near the crime scene at the time of the shooting. Finally, possible suspects, such as Williams, should be interviewed as possibly providing an alternative, exculpatory version of the events. (Such a version was alluded to by Kuhlen in Harris's opening statement.)

Respondent, the party moving for summary judgment, offers the October 14, 1983 affidavit of Todd Musberger as evidence of Musberger's competency. Musberger states that, "My best recollection is that Alice Riles and Leroy Carter were among the witnesses that could not be located. All police witnesses were interviewed before the trial and each cross examination was made with the most effective trial strategy in mind." (Respondent's Answer and Motion, filed 10/21/83, Musberger Affidavit.) However, the trial record indicates that Riles and Carter were in court on the day trial started, (Tr. 23), at least one because of Musberger's subpoena. This inconsistency, plus Musberger's failure to state explicitly whether he interviewed these two witnesses, prevent the court from determining on this motion that Musberger did investigate these witnesses and make an informed judgment regarding use of their testimony at trial.

Regarding the alibi witnesses, Musberger states:

> On two occasions that I presently recall, I interviewed Jewel Connor, Mary Connor and Genise Connor. I recall interviewing Thomas Charles on one occasion. It was my considered opinion that the jury would not find these people credible. Therefore I decided as a matter of trial strategy not to call any of these people as witnesses at Mr. Harris's trial.

(*Id.*) Musberger does not indicate whether he checked the Cook County Hospital records in an attempt to corroborate this story.

In the affidavits of the alibi witnesses, Z. Mary Connor and Genise Connor state that they were available to testify and were not called, but do not mention whether Musberger interviewed them. Jewel Connor's affidavit indicates that she twice contacted Musberger in an attempt to explain her story to him. Musberger's affidavit is thus technically consistent with these alibi witness

affidavits, although Musberger provides no reason for his conclusion that the witnesses were not credible.

Musberger states that he interviewed all police witnesses. As Harris does not claim that Musberger did not interview McWhorter, the court will assume that McWhorter was interviewed. Musberger does not expressly state that he interviewed Williams, who could have testified that Harris was not at the scene of the shooting.

Musberger does not respond to Harris's claims concerning impeachment evidence. While Musberger may not have been allowed to present extrinsic impeachment evidence, reasonably competent counsel should investigate possible avenues of impeachment. The evidence that Slater could not have known Harris through frequent contacts at a poolroom which allegedly did not exist is such an apparent avenue of impeachment.

This discussion reveals that one part of the ineffective assistance of counsel test—that pertaining to reasonably competent professional representation—cannot be decided on this motion. Musberger's affidavit is too general to answer all of Harris's claims. The court may deny a claim of ineffective assistance, however, if the prejudice component is not satisfied. Should Harris's allegations be true, however, he may have satisfied the prejudice test. On this record and with Musberger's conclusory affidavit, the court cannot make a finding that the alibi witnesses were not credible. Moreover, impeachment of Slater additional to that accomplished at trial would cast further doubt on the reliability of the verdict. This is especially true regarding the nonexistence of a poolroom at 13th and Kedzie, which would impeach Slater's credibility as well as his identification. Finally, the alternative possible version of events, that Williams or McWhorter may have been responsible for the shooting, also casts further doubt on the verdict. Hence, both the competence of counsel's representation and the possible prejudice re-

sulting therefrom should be examined in an evidentiary hearing. Such a hearing is appropriate when facts are in dispute and petitioner was not afforded a full and fair hearing on the ineffective assistance issue in the state system. *Townsend v. Sain*, 372 U.S. 293, 312-13, 83 S.Ct. 745, 756-57, 9 L.Ed.2d 770 (1963).

Respondent's motion for summary judgment as to ineffective assistance of counsel is denied. An evidentiary hearing on this claim will be set. Harris will be appointed counsel to aid him in this hearing. Rules Governing § 2254 Cases, 28 U.S.C. fol. § 2254, Rule 8(c).

III. Newly Discovered Evidence

Harris's third claim is that his custody violates the federal constitution, as newly discovered evidence demonstrates he is innocent of the charged crime. In Harris's original post-conviction petition, which Abrahams states she filed on July 17, 1979, Harris requested a new trial based on newly discovered evidence and on ineffective assistance of counsel. Paragraphs 1 through 6 contain the allegations of newly discovered evidence, namely, the affidavit testimony of Melvin McWhorter. The affidavit reads in part:

> I was acquainted with Pete Earnest Howard befor [*sic*] he was killed and have on occasion, purchased narcotics from him.
>
> On July 9, 1977, about 10:00 P.M., I was present in the fifteen-hundred block of South Christiana Avenue and consequently, witnessed the shooting of Mr. Howard. He was shot by George Williams, whom I have known for over twelve (12) years.
>
> I am also acquainted with Antonio Slater. . . . On July 9, 1977, Antonio Slater was not present in the fifteen-hundred block of South Christiana at 10:00 oclock [*sic*] pm. the night Pete Earnest Howard was killed.

(McWhorter Aff., dated June 29, 1979.) Harris alleges in his original post-conviction petition that this evidence was not and could not have been discovered by him or his counsel at an earlier date.

The amended post-conviction petition, however, omits the claim of newly discovered evidence. Rather, the entire claim rests on the allegation of ineffective assistance of counsel. No mention is made of the McWhorter affidavit, although it was incorporated as an exhibit to the amended petition. (Motion to Reconsider, filed 10/18/82, Exhibit 3 at pp. 1-6 [Transcript].) At the March 19, 1979 hearing, Harris's attorney Hardiman did not mention the McWhorter evidence.

As discussed above, the lower post-conviction court found that Harris had been provided effective assistance of counsel. It did not mention newly discovered evidence. On appeal of the post-conviction petition, it is clear that ineffective assistance was also the only issue presented. (*See* Motion of Exceptions, filed 8/20/82, Exhibit [Brief and Argument for Petitioner-Appellant].) The Appellate Court clearly reached only the ineffective assistance argument. Although it noted the McWhorter affidavit on page 3, the Court failed to mention it again in the opinion.

In Illinois, in order to obtain a new trial based on newly discovered evidence, a defendant must show that the evidence could not have been produced at trial by use of reasonable diligence, that the evidence is non-cumulative, and that the evidence is of such a conclusive character that it would probably change the result. *People v. Sullivan*, 95 Ill.App.3d 571, 51 Ill.Dec. 60, 420 N.E.2d 474 (1st Dist.1981). Motions for new trial are subject to close scrutiny. *People v. Carpenter*, 74 Ill.App. 3d 770, 30 Ill.Dec. 395, 393 N.E.2d 50 (1st Dist.1979), and have been frequently characterized as "disfavored," *e.g.*, *People v. Wolf*, 48 Ill.App.3d 736, 6 Ill.Dec. 720, 363 N.E.2d 402 (2d Dist.1977), *cert. denied*, 435 U.S.

915, 98 S.Ct. 1469, 55 L.Ed.2d 506 (1978); *cf. United States v. Feldman*, 756 F.2d 556, 560 (7th Cir.1913).

Newly discovered evidence must be presented to the trial court in a motion for new trial. Motions for new trial are governed by Ill.Rev.Stat. ch. 38, ¶ 116-1, which provides that they must be brought "within 30 days following the entry of a finding or the return of a verdict." *Id* at ¶ 116-1(b). Exceptions to this 30-day requirement are narrow. *People v. Ferguson*, 102 Ill.App.3d 702, 57 Ill.Dec. 958, 429 N.E.2d 1321 (1st Dist.1981), *cert. denied*, 459 U.S. 872, 103 S.Ct. 159, 74 L.Ed.2d 133 (1982) (where sole prosecution witness recants or where prosecution prevented defendant from discovering evidence). Harris has not alleged compliance with these procedures. Moreover, Harris does not claim that these procedures themselves violate his federal due process rights. *Cf. Griswold v. Greer*, 712 F.2d 1200, 1205 (7th Cir.1983).

A. Waiver

The court will assume that Harris filed a timely motion for new trial based on newly discovered evidence. However, unlike the ineffective assistance of counsel argument, the newly discovered evidence argument was not presented to nor considered by the reviewing Illinois courts. As described above, Harris omitted to make this claim before both the post-conviction and the direct appeal lower and appellate courts. Hence, this court is barred from considering the merits of the claim. *Wainwright v. Sykes*, *supra*. Harris has advanced no explanation for this procedural default.

B. Merits of Newly Discovered Evidence Claim

Were the court to consider this issue, review would be narrow. In a federal habeas action, courts review the state proceedings for violations of federal constitutional rights. 28 U.S.C. § 2254(a). Hence, a federal court will

not review the merits of a state court's denial of a new trial motion solely under the state standards for the granting of a new trial. *United States ex rel. Guillen v. DeRobertis*, 580 F.Supp. 1551, 1556 (N.D.Ill.1984).

The scope of federal habeas corpus review concerning newly discovered evidence is described in *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). In that case, the Court explained:

> Where newly discovered evidence is alleged in a habeas application, evidence which could not reasonably have been presented to the state trier of facts, the federal court must grant an evidentiary hearing. Of course, such evidence must bear upon the constitutionality of the applicant's detention; the existence merely of newly discovered evidence relevant to the guilt of a state prisoner is not a ground for relief on federal habeas corpus.

Id. at 317, 83 S.Ct. at 758. This reason has led courts to the principle that a denial of a motion for new trial based on newly discovered evidence may be reviewed only for the presence of an error of constitutional magnitude. *Sublinsky v. Callahan*, 680 F.2d 7, 9 (1st Cir.1982), *cert. denied*, 460 U.S. 1090, 103 S.Ct. 1798, 76 L.Ed.2d 356 (1983); *Guillen*, 580 F.Supp. at 1556. The Fifth Circuit has explained this test as follows:

> Questions of guilt or innocence are not matters to be considered upon petition for habeas corpus. . . . Newly discovered evidence in the form of a confession by another does not render the conviction void and subject to collateral attack by habeas corpus because it goes to the merits of the conviction, not to its legality. . . . [T]he confession 'might be urged as a proper subject for executive clemency, but it affords no basis for judicial action.'

Anderson v. Maggio, 555 F.2d 447, 451 (5th Cir.1977) (citing *Shaw v. Ellis*, 255 F.2d 509, 511 (5th Cir.1958)).

This discussion is consistent with the Supreme Court's analysis that a petitioner in Harris's position have some "justifiable reason" for failing to present the newly discovered evidence to the trial court. *Townsend v. Sain*, 372 U.S. at 317, 83 S.Ct. at 750.

Even assuming, however, that this court should apply the standards the Illinois courts would apply to a newly discovered evidence claim, Harris has not satisfied those standards. First, it is clear that McWhorter was known to Harris and his counsel at least at the time of the state's disclosure of certain police reports in pre-trial discovery. Harris does not explain why he or his counsel could not obtain McWhorter's statement before trial. Moreover, Harris does not claim that his counsel was ineffective with respect to investigation of McWhorter. Hence, Harris has not offered a "justifiable reason" for not presenting this evidence at trial. Second, the lack of credibility of the McWhorter testimony would also justify a finding by the Illinois courts that the evidence was not of such a conclusive character as to make it probable that the result would be different. On two occasions before the execution of the affidavit, McWhorter had stated that he *did not see* the shooting. His third story was thus subject to damaging impeachment. Harris's failure to satisfy this standard, which is at least as demanding as any federal constitutional standard would be, provides a second, alternative, reason to grant respondent's motion for summary judgment as to the newly discovered evidence claim.

IV. Sufficiency of the Evidence

Harris's final claim is that the evidence presented by the state was constitutionally inadequate to support his conviction. The Illinois Appellate Court examined the record on the question of sufficiency and affirmed Harris's conviction. A question is raised as to the test to

be applied in determining the sufficiency of the evidence in a § 2254 case.

The Seventh Circuit clearly applies the so-called "reasonable doubt" test in determining whether federal convictions are supported by constitutionally sufficient evidence. *United States v. Moya*, 721 F.2d 606, 609-10 (7th Cir.1983), *cert. denied*, —— U.S. ——, 104 S.Ct. 1312, 79 L.Ed.2d 709 (1984); *United States ex rel. Foster v. DeRobertis*, 741 F.2d 1007, 1012 (7th Cir.1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 972, 83 L.Ed.2d 975 (1985). The "reasonable doubt" test is satisfied when a reviewing court finds that, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Foster*, 741 F.2d at 1012. In applying this test, the reviewing court must "assume that the jury drew all reasonable inferences in the prosecution's favor. . . ." *Id. See also United States v. Herrera*, 757 F.2d 144, 149-150 (7th Cir.1985).

The Seventh Circuit has applied this test in reviewing state court convictions as well. *See Foster, supra; Rooven v. Owens*, 752 F.2d 1186, 1187 (7th Cir.1984). There is some question as to whether this test would apply to an Illinois conviction based only on circumstantial evidence, *see Foster*, 741 F.2d at 1012-13, but the present case does not require resolution of this issue.

The court has carefully reviewed the trial transcript in this case. The review centers on what was presented at trial, not what could or should have been raised therein. The present record therefore supports Harris's conviction with sufficient evidence. The jury was presented with the occurrence testimony of Antonio Slater. As discussed above, Slater testified that he witnessed the shooting, and that Harris, whom he knew as "Wayne," was the perpetrator. Slater further testified that he had

at least a few seconds to view the perpetrator's face, which was illuminated both by street lights and by Slater's headlights. Additionally, Slater's identification was enhanced by his prior knowledge of Harris. Harris's cross-examination of Slater, while lengthy, delved into minor inconsistencies in Slater's story. This cross-examination affected the weight of Slater's testimony, but cannot be characterized as destroying his credibility or the consistency between his pre-trial and in-court stories.

The jury could reasonably believe Slater's testimony and his ability to identify the perpetrator. A rational jury thus could have found the elements of the offense of murder beyond a reasonable doubt. Whether that would have been the finding if Harris's counsel had taken the course of defense recommended by Harris is not relevant to the present inquiry concerning sufficiency of the evidence. Respondent's motion for summary judgment on this ground is therefore granted.

Conclusion

Respondent's motion for summary judgment is granted except as to the ineffective assistance of counsel claim. An evidentiary hearing shall be held on the remaining claim. The court will appoint an attorney for Harris under Rule 8(c), 28 U.S.C. fol. § 2254.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

(Title Omitted in Printing)

MEMORANDUM OPINION AND ORDER

SUSAN GETZENDANNER, District Judge:

This petition for a writ of habeas corpus, 28 U.S.C. § 2254, is before the court for entry of findings of fact and conclusions of law. Petitioner Warren Harris alleges that he was denied effective assistance of counsel at his state court trial for murder and is therefore incarcerated in violation of the Sixth Amendment to the United States Constitution, as applied against the states through the Fourteenth Amendment. On April 8, 1985, this court denied the respondent's motion for summary judgment. That opinion is reported at 608 F.Supp. 1326. An evidentiary hearing was held over three days in November of 1985, and post-trial memoranda became fully briefed on February 26, 1986. Although this is a close and difficult case, the court determines that petitioner has not met his burden of showing that his conviction was constitutionally invalid, and therefore enters judgment for respondent.

Findings of Fact

The chief omissions of which petitioner complains concern trial counsel's failure to interview and call certain occurrence witnesses who might have identified someone other than petitioner as the assailant, and trial counsel's failure to call proffered alibi witnesses to the stand. Other trial errors are alleged as well. In order

to assess the merits, a full history of counsel's pre-trial and trial performance is necessary.[1]

1. Pursuant to a two-count information, petitioner Warren Lee Harris was charged with the murder of one Ernest ("Pete") Howard in August of 1977. Petitioner entered a plea of not guilty and Todd Musburger of the Cook County Public Defender's Office was appointed to represent him. Musburger had been with the public defender's office for about four years. Harris's case was Musburger's first murder jury trial, although he had conducted several felony jury trials. Musburger was joined by Kathryn Kuhlen as co-counsel.

2. On September 7, 1977, a preliminary hearing was conducted before the Honorable David J. Shields of the Circuit Court. The chief witness at the preliminary hearing was Antonio Slater, who testified that on July 9, 1977, at approximately 10:00 p.m., he was driving on the 1500 block of South Christiana Street in the City of Chicago. At that time, Slater heard a gunshot and saw a man fall to the ground. He looked around and saw another man with a pistol in his hand run to a Buick Electra and get in. Slater testified that he recognized the man as petitioner, whom he had seen periodically in the vicinity of a liquor store at 13th and Kedzie Streets, and knew as "Wayne."

3. On cross-examination, Musburger elicited that Slater did not hang out on South Christiana regularly, that Slater had turned off onto Christiana from Douglas Street, and that Slater had been stopped on the street for between 3 to 5 minutes because the Buick Electra had blocked his way. Slater testified that the man he saw running away from the victim was a 5'11" black male,

[1] Designations to the hearing transcript are by Volume Number, (I, II, or III) and page number. References to exhibits are to petitioner's exhibits unless otherwise noted, and references to the state court trial transcript are noted as "Tr."

weighing approximately 165 pounds, and wearing black pants and a beige knitted sweater. Slater added that Christiana has orange streetlights, but that the incident did not occur under one. Musburger attempted to elicit information as to how and when Slater first spoke to the police, but the court sustained objections to this line of questioning.

4. Pursuant to pre-trial discovery, counsel for the defense obtained copies of the police reports relative to the investigation of Howard's homicide. By virtue of these materials, counsel learned the following (the reports contained addresses and phone numbers for all witnesses):

A. Laverne Tapes, the victim's common-law wife, informed the police that the victim, Ernest Howard, was a dope dealer who usually dealt in the area of 16th and Christiana. (Ex. 39)

B. Maurice Williams was at about 16th and Christiana on July 9, 1977 when he heard a gun shot and heard Howard call his name. Howard told Williams that he had been robbed and knew the offenders, but did not mention their names. (Exs. 38, 41).

C. Betty Larry, common-law wife of Maurice Williams, informed the police immediately after the shooting that Curtis Fowlkes had witnessed the incident and had told her that Howard's assailants were two male negroes, one of whom wore a red shirt and dark pants, and that they had fled the area driving a maroon and white 1968 Buick Electra. (Ex. 38)

D. Larry also told the police that Joanne Hightie had told her that she (Hightie) had seen two male negroes running through a playlot at 1521 S. Christiana immediately after the shooting, that one of them had on a red T-shirt with dark pants, and

that the other was wearing a white T-shirt. According to Larry, Hightie had also seen a white-maroon Buick Electra 225, but the vehicle had three occupants. Larry herself recalled that at the time she had spoken to Fowlkes, a male negro wearing a white T-shirt appeared to be with Fowlkes. (Ex. 39).

E. After some initial difficulties locating him, the police interviewed Curtiss Fowlkes, who stated that he had seen Howard and a man wearing a red shirt talking near the corner of 16th and Christiana Street. Fowlkes turned away for a few seconds and heard a shot. When he turned around, he saw Howard fall to the ground and then saw the man in the red shirt enter a grey 1968 Buick Electra with chrome manifold pipes. Fowlkes described the man as being a male negro, age 25-26, 5'10" to 6' tall, with a medium build and an afro haircut. This description fit petitioner.

F. Leroy Carter, 1528 South Christiana, was also interviewed by the police. Carter indicated that he had been sitting in his car with his girlfriend (Joanne Hightie) in front of 1528 South Christiana with the radio on, the windows closed, and the air conditioner running. At about 10:00 p.m., Carter saw the described man with the white T-shirt running into the playground in a northeast direction from 16th and Christiana. (Ex. 41).

G. Rose Anderson indicated that the same man described by Carter approached her at a neighborhood tavern just before midnight, told her he had been with "Pete" at the time of the shooting, and asked if Pete had died yet. Anderson added that before she could respond, the man noted Darryl Tapes, the victim's brother-in-law, arriving, and left hurriedly. (Ex. 40). Through Anderson's cousin, the police learned that the man was known as "Buster" and lived in the vicinity of 12th and Lawndale.

H. Clarence Gibson, a friend of the decedent, told police that on the night of the incident, he heard a shot, went outside and met "Buster" who was walking toward 16th Street. Buster informed Gibson that "Pete" had been shot, and the two men went back to the scene of the crime to watch the police carry the body away.

I. The police also interviewed Alice Marie Riles, 1515 S. Christiana, who related that she had been sitting on the front porch of her house when she heard a shot. Immediately thereafter, Riles saw two men running in a northeasterly direction and into a vacant lot near the playlot described by Carter and Hightie.

J. The police located Buster, now identified as Melvin McWhorter of 1506 S. Lawndale. McWhorter agreed to come to Area 4 headquarters for questioning, was advised of his rights, and then denied any knowledge of the shooting.

K. Both Riles and Carter, separately viewing a lineup, positively identified McWhorter as the man running through the playlot around the time of the shooting. (Exs. 43, 44). Upon further questioning, McWhorter stated that he was with one George Williams (a/k/a "PRO") at the time of the shooting.

L. At a later date, McWhorter admitted being untruthful in his earlier interview, and related that on the evening of the homicide he and George Williams had gone to 16th and Christiana to buy narcotics. Standing in the vacant lot on the east side of Christiana, McWhorter noticed several persons on the west side of the street, including petitioner Warren Harris. McWhorter said he did not see Howard at that time, or he would have bought dope from him. McWhorter then heard a gunshot and saw Harris walking south on Christiana and then west

on 14th Street away from the shooting. McWhorter further related that on Tuesday, July 12, 1977, Harris approached both him and George Williams and warned that they would be harmed if they told anyone Harris had been present when Howard was shot. McWhorter had known Harris for about four years and positively identified a photo of him.

M. On August 8, 1977, the police finally located and interviewed George Williams. Williams told the police that he and McWhorter were standing in a gangway across the street from where Howard was later found when they heard a shot. Williams walked across the street and saw the victim and numerous other persons in the surrounding area. Williams was asked if he saw Harris at the scene, and he answered no but that he had heard from some persons in the area that Harris was the killer. (Ex. 46).

N. Through an unidentified informant, police later were informed that one Antonio Slater had witnessed the incident; Slater was located on August 19th and gave the police a written statement. This statement largely corroborated Slater's testimony except for the important fact that Slater said he had driven onto Christiana from 16th Street, not Douglas Street as later testified. (Christiana is a one-way southbound street, and 16th Street is south of the block where Howard was killed.) Slater also mentioned that his headlights had caught Harris's face, and that Harris got into the Buick and drove off passing him. Slater then looked at a group of five photos and identified Harris as the shooter.

O. Based on Slater's statement, Harris was apprehended for investigation. The police found Harris lying in the rear seat of a parked auto at 1201 S. Lawndale, arrested him, and advised him of his rights. Harris said he was not present when the victim was shot and would not make any further

statements. The police charged Harris with murder and officers were ordered to locate Curtis Fowlkes to see if he could identify Harris. The record nowhere reveals whether Fowlkes was ever located.

5. Based on the foregoing, Musburger obtained through further discovery the rap sheets of McWhorter, George Williams, Darryl Tapes, Betty Larry, Curtiss Fowlkes, Leroy Carter, and others named in the police report but of no consequence here. Antonio Slater had no criminal record; the other witnesses all did.

6. Musburger could not recall what specific efforts he made to interview the witnesses named in the police files. He recalled making such efforts generally but having very little success in finding witnesses whose testimony would have been helpful. (I. 92, 103). He specifically recalled attempting to interview a man in a basement apartment who refused to cooperate, and remembered speaking to two women across the street from that apartment who told him that if called to testify they would identify Harris as the shooter. (I. 103). At his deposition, Musburger recalled that these women had previously said something helpful to the police. (Ex. 2, pp. 47-49). He could remember no names for these witnesses, but conjectured at the hearing that Allee Riles was probably not one of the two witnesses. Although Leroy Carter lived in a basement apartment on Christiana, he testified that he never spoke to a defense attorney before trial. The court finds it probable that neither Carter nor Riles were among the witnesses contacted prior to trial.

7. Musburger made no attempt to interview Antonio Slater further, and either could not find George Williams or could not get George Williams to cooperate. There is no evidence as to whether Musburger did or did not interview McWhorter, but Harris has never alleged that Musburger failed to interview McWhorter, or that he (Harris) was prejudiced by this failure.

8. Initially, Harris informed Musburger that he had been in Cook County Hospital on or around the night of the murder, July 9, 1977, and therefore couldn't have committed the crime. Harris testified that he never claimed to have been in the hospital on July 9th, but Musburger remembered otherwise. Although Musburger's memory was sketchy, and Harris did not strike the court as a liar, the court believes that Musburger's memory is probably accurate on this point. Musburger subpoenaed the hospital records to learn that Harris had entered Cook County Hospital on July 13, 1977, after the crime occurred, and had told the doctors on entering that he had been injecting heroin as recently as two days before. (Resp. Ex. 5). Those records also revealed that Harris had been released from Madden Mental Health Center in Hines, Illinois, where he had been treated for hallucinations, on July 7, 1977. (I. 23; Ex. 68). There is no evidence that Musburger subpoenaed these other medical records, and probably he did not.

9. Prior to trial, Musburger spoke with a group of three to six people, including petitioner's mother, Emma Harris, petitioner's common-law wife Jewel Connors, and possibly Jewel's sister Genise Connors. These people informed him that petitioner had been ill at the Connors' home on the day of the incident. (II. 35). Musburger spoke with these people at least twice (I. 13), but determined that they were not believable and would not have withstood cross-examination. He recalled thinking that the witnesses were inconsistent among themselves, although he could not remember specifics, and that some or all of them seemed to be high on drugs. (I. 74-76; II. 25-26). His notes reflect that Mrs. Harris had also informed him she was "positive Warren was home sick with her." (Ex. 65). Musburger's disbelief in these witnesses was fueled by his frustration that Harris's earlier hospital alibi had proven false. (I. 90-92; II. 26).

10. Musburger also spoke with two men whom Mrs. Harris identified at trial as being Ronnie Harris, War-

ren's brother, and Jim Greer, a friend of Ronnie's. (II. 37-38, 82). Both men were willing to testify that Slater and McWhorter were friends and that they had seen the two men together in Chicago's Central Park on the south side. (II. 37-38). Musburger's trial notes make reference to Ronnie Harris and the Central Park area (Ex. 66), but Musburger had no recollection of the names or the allegation. Neither witness was called to testify at trial.

11. Musburger did recall a general concern that Harris's proposed witnesses appeared to be heroin addicts. (I. 75, 96). He emphasized that it was his strategy to keep out any reference to heroin abuse lest the jurors be prejudiced against Harris for drug involvement. (I. 97). While there is no evidence other than Musburger's impression that these witnesses were in fact drug users, the court has no basis for concluding that his perception was demonstrably incorrect.

12. Musburger and co-counsel Kuhlen did not visit the scene of the crime until approximately one month before trial, at which time there was snow on the ground and the leaves were off the trees. (I. 24-25). Although the crime occurred on a summer's night, the only photos of the scene prepared by the defense were taken in the winter during daylight hours.

13. After the preliminary hearing, Musburger never verified whether in fact there was a liquor store at 12th and Keeler where Slater might have seen Harris. There is in fact a billiards parlor at that corner where liquor is apparently sold.

14. On December 15, 1977, the defense answered ready for trial and jury selection in *People v. Harris* before the Honorable Louis Garippo of the Circuit Court. By this time, defense counsel had abandoned any interest in an alibi defense, and intended to rely on the state's inability to prove Harris guilty beyond a reasonable doubt. (Ex.

14). Prior to the opening statement, Laverne Tapes, Alice Riles, Leroy Carter, and a Mr. Tapes (presumably Darryl) were identified as being present in the courtroom. (Ex. 1, p. 22-23). Musburger informed the court that Tapes and Riles had been subpoenaed. *Id.*

15. Upon conclusion of the prosecution's opening statement, Kuhlen made the opening statement for petitioner. In her statement, she identified Melvin McWhorter (who had not been mentioned in the prosecutor's opening) and made the following remarks:

> We believe the evidence will also show that the police learned that two persons immediately after the shooting were seen running away from the scene of the shooting in a northeast direction through a lot on the north side of Christiana. Through further investigation, the police learned that one of those individuals was Melvin McWhorter. They had Melvin McWhorter come to Area Four Police Headquarters, advised him of his rights and interrogated him.
>
> At that time he denied knowing anything about the shooting. They then placed Mr. McWhorter in a lineup and two persons positively identified him as one of the individuals they had seen running away from the scene immediately after the shooting.
>
> The police then confronted Mr. McWhorter again and Mr. McWhorter changes his story and says what he said before was a lie, and then tells the police that he had gone into the neighborhood to purchase narcotics, that he was across the street at the time of the shooting but that he didn't see the shooting itself.

(Tr. 32-33). Kuhlen continued, discussing how Slater's statement to the police six weeks after the shooting switched the focus of suspicion from McWhorter to Harris, and asking the jury to examine closely Slater's credibility.

16. Musburger recalled interviewing witnesses during the course of trial, without substantive results. (I. 103; II. 11-12). Just before opening statement, Kuhlen advised the court that both Alice Riles and Leroy Carter "might be called in rebuttal, depending on what the state has." (Tr. 23). Leroy Carter recalled that on the day he showed up at the courtroom he spoke in the hallway with a male lawyer who told him that they might need him and then they might not. (III. 11-12, 21). The court finds that the person was probably Musburger, even though Musburger himself did not recall the interview, since Carter would have been of no use to the prosecution. Had Carter been called to testify, he would have said that he saw a man other than Harris running across a playlot shortly after the shooting, and that the man was the same he'd identified at the police line-up. Carter did not witness the shooting, however, and could not remember at the evidentiary hearing whether he'd seen a Buick Electra or not. (III. 6, 17).

17. The state called six witnesses: Howard's father, to testify to the fact of death; Maurice Williams, who came to the victim's aid just after the shooting; Officer Joseph Michalle, who appeared on the scene shortly thereafter; Antonio Slater; the officer who arrested Harris; and the doctor who performed the autopsy.

18. On direct examination, Williams was asked whether he knew a person by the name of Buster. He said yes, and, in response to further questions, said he saw Buster at the crime scene sometime after the police arrived. (Tr. 46). On cross-examination, he reiterated that it wasn't until *after* the police arrived that he saw Buster. (Tr. 51).

19. During the prosecutor's case, Musburger made an oral motion in limine to preclude the state from eliciting any testimony as to threats Antonio Slater had received in connection with the case. The prosecutor represented

to the court that shortly after Harris's arrest, Slater's automobile was shot up. Harris himself was in custody at the time. The prosecutor advised it would not elicit the information on direct examination, and the matter was dropped. (Tr. 54-55).

20. Slater was the sole witness at trial to identify Harris. Slater testified on direct examination that he was driving Southbound on Christiana from Douglas Street when he heard a shot and witnessed a man push down another man, who fell. The man who remained standing then turned and ran to a Buick Electra sitting in the street, momentarily faced Slater, pulled up a pistol at Slater, and jumped into the passenger seat of the car. Slater's headlights picked up the man's waist, and Slater recognized the man as Wayne, whom he knew from a poolroom at 12th and Kentie. Slater also pointed out Harris in the courtroom and mentioned that gold street lights along Christiana were lit. Slater further testified that he went to the police station on his own, and that he didn't know anyone by the name of Buster or Melvin McWhorter.

21. On cross-examination, Musburger brought out that Slater had waited almost six weeks before talking to the police. Musburger also highlighted several inconsistencies between Slater's pretrial statements and his trial testimony. In particular, Musburger brought out that Slater's signed statement to the police refers to turning onto Christiana from 10th Street, not Douglas; that Slater told the police that Harris got into a car which "drove off past" him instead of one which blocked his way in front; and that he told the police a whole bunch of people came around after the shooting but said at trial that he saw no one else other than Howard and petitioner. Slater was also impeached as to whether his car was stopped for mere seconds or a few minutes, and admitted that he had not seen Harris at the poolroom for over two years. Musburger did not impeach Slater's

statement that he had gone to the police voluntarily, that there were streetlights, or Slater's statement at trial that he knew Harris from a poolroom (as opposed to a liquor store) at 13th and Keeler. (I. 27).

22. On December 21, 1977, the defense rested without putting on any evidence. Harris first learned of counsel's decision not to put on a defense earlier that morning, when Musburger advised him that Slater had been successfully impeached. (II. 78). Harris went along on counsel's advice. Musburger recalled that at the time the state closed their case, he and Kuhlen felt that the prosecution's case was weak and that the jury "would be out a very short time and give a not guilty to our client," and that this was the "biggest reason" why no witnesses were called. (II. 32). Musburger also must have been aware that this meant abandoning the McWhorter line of defense, since he orally moved to preclude the state from commenting in closing on Kuhlen's opening statement. (Tr. 128).

23. Later that same day, the jury returned a verdict of guilty. Immediately afterwards, the alibi witnesses angrily confronted Musburger outside the courtroom to ask why no witnesses had been called in Harris's defense. Musburger recalled the confrontation as "not a comfortable moment." (I. 22).

24. Charles Thomas, a letter carrier for the United States Post Office since 1969, was at the time of petitioner's trial the common-law husband of Genise Connors, the sister of petitioner's common-law wife, and knew Warren socially. Thomas was available to testify at petitioner's trial but was never contacted by petitioner's lawyer. Had Thomas been called, he would have been willing to testify that petitioner was home sick the evening of the murder, July 9th. Thomas recalled being at the Connors' house after he got off work that day to assist them in preparing for movers who were to come

the next day. (II. 56). Thomas was a credible witness, has an honorable discharge from the army, and would not have presented the drug problems that Musburger noticed with petitioner's other proposed witnesses. However, Thomas's testimony would not have been terribly helpful, since the only reason he was sure of the date was that Genise had told him it was the day "that Warren was at the hospital and we was all moving and everything." (II. 53).

25. Genise Connors is a high school graduate and is presently employed as a lab technician at Chicago Rawhide. (III. 32-33). In July of 1977, Ms. Connors' mother and Jewel Connors lived at 1106 S. Independence, Chicago, Illinois. (III. 34). Genise Connors spoke to Musburger on two occasions prior to trial and informed him that she was willing to testify. (III. 40-42). She was never called to testify at petitioner's trial.

Had Genise Connors appeared at petitioner's trial, she would have testified that petitioner was home sick on the evening of July 9, 1977, while she and the other members of her family were engaged in packing and loading her mother's house incident to Mrs. Connors' move to Mississippi. Genise Connors' testimony as to the events of July 9, 1977, were not credible. She knew Harris was sick in bed one night during three days of packing, but she couldn't single out which one. (III. 36-37, 43-44). The only thing Connors could distinctly remember at the evidentiary hearing was that Harris was arrested on the corner outside her home on Independence the day or so after the move. (III. 45-46, 50). According to the state court trial testimony, the police records, and petitioner's own testimony here, petitioner was arrested more than a month later at a different location. (III. 63). Connors' certainty on this clearly erroneous point led me to believe that she was not a credible witness, and most likely would not have been a credible alibi witness back in 1977.

26. Harris himself testified to being home sick around the night of the move, and said he was sure of the date because of his release from the hospital. Records show, however, that Lawrence Moving came to the Connors house on July 8th, the day before the murder. Thomas remembered the events happening before the movers came, on a day he worked, and apparently on a day Cemine said Warren had been at the hospital. The court finds that Warren was home sick one night in early July, but that the evening in question was probably Thursday, July 7, 1977 (the date petitioner was released from Madden), or even Friday, July 8, 1977, but probably not Saturday, July 9, 1977.

Conclusions of Law

1. Under *Strickland v. Washington*, 104 S.Ct. 2052 (1984), a criminal defendant who wishes to set aside his conviction for ineffective assistance of counsel must demonstrate that "counsel's representation fell below an objective standard of reasonableness," *id.* at 2065, and that there exists a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Id.* at 2068. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

2. The "reasonable probability" standard of *Strickland* is more restrictive than the standard applied by the Seventh Circuit in *United States ex rel. Casey v. Wolff*, 727 F.2d 656, 658 (7th Cir. 1984), where the court said: "Once a court finds that . . . the counsel's [unprofessional] acts or omissions may have impaired the defense, the burden of proof is on the government to prove beyond a reasonable doubt that the trial counsel's ineffective assistance did not affect the verdict." In effect, petitioner must show that the error was probably not harmless. However, a habeas petitioner raising an ineffectiveness claim need *not* show that counsel's performance "more

likely than not" affected the outcome of the trial. *Strickland*, 104 S.Ct. at 2068.

3. Effective representation hinges on adequate pretrial investigation, and therefore the right to competent counsel imposes a correlative duty on defense counsel to undertake reasonable steps in determining all avenues of defense. *Crisp v. Duckworth*, 743 F.2d 580, 583 (7th Cir. 1984), *cert. denied*, 105 S.Ct. 1221 (1985). Strategic choices made after less than complete investigation are reasonable only to the extent that professional judgments support the limitations on further investigation. *Strickland*, 104 S.Ct. at 2066. An informed tactical choice of trial strategy, however, is not reviewable on an ineffectiveness claim. *United States v. Dyer*, 786 F.2d 812, 816 (7th Cir. 1986).

4. Pursuant to the above, defense counsel should ordinarily interview not only his or her own witness, but also those that the state intends to call. *Crisp*, 743 F.2d at 584; *United States v. DeCoster*, 487 F.2d 1197, 1204 (D.C. Cir. 1973).

5. Although each allegedly incompetent act or omission must be examined individually, the cumulative effect of all errors must be examined in light of the totality of the circumstances, including the strength or weakness of the government's case. *Strickland*, 104 S.Ct. at 2069; *Crisp*, 743 F.2d at 583.

6. Petitioner has failed to show that his attorney acted unreasonably in deciding that petitioner's proferred alibi witnesses were unreliable and thereby declining to call them as witnesses. The chief alibi witness, Ms. Connors, struck this court as lacking credibility, and the moving records weaken rather than substantiate the alibi.

7. Petitioner has failed to show that counsel acted incompetently in not calling any of the doctors at Cook County Hospital to corroborate the alibi witnesses' story

that he was ill on July 9, 1977. The hospital records would have injected the issue of Harris's heroin use into the trial, which Musburger sensibly wished to avoid. Moreover, Musburger had already decided that the alibi was not credible, and therefore there was nothing to corroborate.

8. Petitioner has failed to show prejudice from counsel's alleged failure to interview or call as witnesses Investigators Peck and Sykes to impeach Slater as to where the victim was shot. The police records sustain Slater's testimony that Howard was shot on the sidewalk, and neither investigator was called at the evidentiary hearing to testify otherwise.

9. Petitioner has failed to show prejudice from counsel's failure to interview or call as a witness George Williams. Williams did not appear at the evidentiary hearing, his statements to the police are not exculpatory of petitioner, and it therefore remains speculative whether Williams' testimony would have helped the defense.

10. Petitioner has failed to show that counsel unprofessionally failed to interview or call Joann Hightie, or that he was thereby prejudiced. Given counsel's admission that he probably would not have subpoenaed Riles unless he thought she might be helpful, that would make it likely that Hightie was one of the women he spoke to on Christiana St. While the evidence is unclear, even if counsel did not interview Hightie, it is speculative whether her testimony would have helped the defense. Although Hightie had told the police saw two men running through a playlot, she also saw a Buick Electra similar to the car described by Slater. While Hightie "might" have testified at trial that the car was a different color, it is not reasonably certain she would have, and the discrepancy could be seen as a minor point.

11. Assuming that Musburger never interviewed Fowlkes (the evidence is unclear), petitioner has none-

theless failed to show prejudice from this omission. It appears from the circumstances that Fowlkes would have strengthened the government's case in that he described Howard's assailant as age 25-26, 5'10" to 6' tall, medium build, dark complexion, and medium afro hairstyle—terms which matched Slater's description and which fit petitioner. Fowlkes had also seen the assailant get into a Buick Electra parked alongside the scene, and was according to Betty Larry with McWhorter after the crime. Although Fowlkes testified to a different colored shirt and car than had Slater, these discrepancies might have been explained or been viewed as minor in light of the significant similarities. It is troubling that the police records indicate a search for Fowlkes without further mention, but this court never learned what further testimony from him would have produced. Petitioner has therefore not shown that Fowlkes' testimony was reasonably likely to help his defense so as to show prejudice from counsel's omission.

12. Petitioner has failed to show that trial counsel was ineffective in that the defense photographs of the crime scene were taken during the day after leaves had fallen from the trees. Trial counsel was able to use the photographs to instruct the jury on the important point that no streetlights would have directly illuminated where Howard was shot, and there is no indication on this record that night pictures would have materially aided that impeachment. This impeachment by photograph also cures any alleged ineffectiveness regarding counsel's failure to cross-examine Slater about the streetlights; the photographs provided a surer route to effective impeachment, and, contrary to petitioner's allegation ¶12, Slater's preliminary hearing testimony as to the presence of streetlights was not inconsistent with his trial testimony. While night pictures, if obtainable, might have been preferable, the benefit is speculative and counsel's oversight is in any event too minor to justify vacating Harris's conviction.

13. Petitioner has failed to show prejudice from counsel's failure to investigate the existence of a poolroom at 12th and Kedzie, since the testimony at this trial indicates that there is in fact a billiards parlor at that corner. While Slater referred at the preliminary hearing to the poolroom as a liquor store and not a poolroom, petitioner's counsel suggested at one point in this court that the billiards parlor in fact sells liquor. The court does not find counsel's failure to impeach Slater on this discrepancy a significant omission which would have been reasonably likely to help the defense.

14. Petitioner has failed to show ineffectiveness in counsel's failure to offer into evidence the agreed stipulation that would have perfected the impeachment of Slater's trial testimony regarding whether he turned onto Christiana from Douglas Street. Slater had originally told the police that he had turned onto Christiana from 16th Street, which meant he would have turned onto Christiana (a southbound street) south of where the shooting occurred. On cross-examination, Slater denied ever telling the police that he turned off of 16th street but admitted that his signed written statement said 16th Street. (Tr. 92). The parties worked out a stipulation that Officer Shine, if called to testify, would verify the accuracy of the signed statement as to what Slater had said. (Tr. 123-24, 128). The prosecutor agreed to treat the impeachment as perfected, however, and the stipulation was never introduced. (Tr. 130). Mulqueen testified that he didn't want to aggravate the jury by further corroborating Slater's admission to an inconsistent statement. (II. 27-28). The court finds this explanation questionable, since a stipulation is hardly aggravating. The court notes, however, that the inconsistency was argued to the jury, and the prosecution, pursuant to its agreement, never mentioned in closing argument Slater's denial of the inconsistency. The prejudice, if any, is too tenuous to support overturning petitioner's conviction.

15. Petitioner has not shown that counsel was ineffective for not impeaching Slater's testimony that he went to the police voluntarily. Under the McWhorter theory, which counsel had concluded was its best defense when trial began, having Slater voluntarily approach the police made it more likely that he was protecting someone. The failure to impeach Slater on this point by calling Officer Shine was neither unreasonable nor prejudicial, and possibly a tactical decision.

16. Petitioner has failed to show prejudice from counsel's failure to file a motion to disclose the identity of the informant. Munbergor conceded at trial that this information could have been crucial had it provided a link between McWhorter and Slater, and the omission was not backed up by any professional judgment. Nonetheless, Munbergor remembered no evidence of a McWhorter/Slater link, and petitioner has put forth no competent evidence at this hearing to show that McWhorter and Slater were in fact acquainted. It is therefore wholly speculative what such a motion would have revealed.

17. Petitioner has failed to show ineffectiveness in counsel's failure to interview Slater prior to trial. The need for such an interview was diminished in part by Munbergor's ability to cross-examine Slater at the preliminary hearing, and any attempt at an interview was problematic given that Slater's car had been shot at in an apparent threat attempt, which may or may not have been linked to petitioner. It is speculative on this record whether a pretrial interview could have enhanced Munbergor's ability to impeach Slater in a material way.

18. Petitioner has failed to show prejudice from counsel's failure to put Ronnie Harris or Jim Gates on the stand to testify that McWhorter and Slater had been seen together in Chicago's Central Park. (H. 50). Police reports indicate that Slater in fact lived on Central Park. (Ex. 69). Munbergor could not recall why he did

not call these people to the stand. (I. 47-48). The state argues in its brief that these witnesses must have been among the witnesses whom Musburger thought were drug users. This is plausible, but Musburger's trial notes make reference to Ronnie Harris and the Central Park area, and the McWhorter defense, unlike the alibi defense, remained a viable theory at the time trial began. Thus it is doubtful whether or not the decision not to call Harris and Greer as witnesses was based on professional judgment. In any event, this court heard no testimony from either Greer or Ronnie Harris which would have enabled it to determine, as with Genise Connors, whether their testimony would have been available, and therefore helpful to the defense.

19. Even if petitioner has shown ineffectiveness in connection with counsel's not putting Greer or Ronnie Harris on the stand, not taking proper photographs, and not interviewing Hightie, Fowlkes, and Slater, these claims were never made in the state post-conviction hearing and are therefore waived under the doctrine of *Wainwright v. Sykes*, 433 U.S. 72 (1977).

20. Although the evidence is very close, petitioner has failed to show prejudice and ineffectiveness in counsel's decision not to call Allan Elkes and Leroy Carter as witnesses at trial. It is more probable than not that these witnesses were consulted by counsel at trial, however briefly, and that counsel then made a strategy decision at the close of the state's case not to put them on the stand. This strategy puzzled the court greatly at the hearing, since Elkes' and Carter's testimony might have raised doubt by suggesting that the man running from the scene were in fact the assailants, and Musburger's belief in a probable acquittal would not exclude putting on further helpful evidence.

Close examination of the police records, however, reveals that the McWhorter story was not as strong a de-

from as Kuhlen's opening statement suggests. While Carter would have testified that he saw two men, one of whom was McWhorter, run from the area just after the shooting, Carter could offer no further exculpatory testimony, and Musburger knew of several witnesses—Clarence Gibson, Curtiss Fowlkes, Betty Larry—who would be called to corroborate Maurice Williams' testimony that McWhorter had in fact not left the scene. Actually putting on Ellis and Carter as witnesses also raised the possibility that the prosecution would call McWhorter, whom Musburger knew was ready to finger his client.

Thus, the McWhorter defense was chiefly a viable theory for cross-examining the state witnesses, particularly if McWhorter took the stand, but does not appear to have been valuable as an actual defense. Kuhlen advised Judge Garippo that Carter and Ellis might be called in rebuttal depending on the state's case, but Musburger remembered nothing substantive coming out of his continued witness interviews during trial. Moreover, the state weakened this defense by putting on only Slater as a substantive witness and eliciting from Maurice Williams that McWhorter had remained on the scene. Thus, the evidence suggests that Musburger's investigation led him to believe the defense would not have held up, and petitioner has put forth no evidence that the defense theory has merit as the true version of events. The court cannot conclude that trial counsel acted below a level of competence by raising the theory during opening argument but then abandoning the defense after further interviews and after the state had presented a perceptibly weak case.

21. The cumulative effect of all counsel's errors, while troublesome, does not make out a sixth amendment violation. Counsel was clearly remiss in not discussing his strategic decisions with petitioner. It is also probable from the record before this court that petitioner's counsel did not thoroughly investigate all witnesses named in the

police reports, but the benefit which might have accrued from further investigation (and thereby the reasonableness of Musbarger's conduct) is murky at best. As the state notes in its post-trial brief, petitioner's version of the defense is still "no more than a version, even after an extended evidentiary hearing." Specifically, petitioner has not shown that further investigation would have strengthened rather than weakened the defense theory he claims his counsel unreasonably abandoned. Since the police reports are hearsay as to the truth of their contents, this court has insufficient evidence to find that further investigation would have benefitted petitioner. Petitioner has therefore failed to establish a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different.

Conclusion

Accordingly, the court enters judgment for respondent, and *sua sponte* grants petitioner a certificate of probable cause for appeal. 28 U.S.C. § 2253. Appointed counsel are directed to advise petitioner of his right to appeal and the procedures for filing an appeal.

It is so ordered.

/s/ Susan Getzendanner
SUSAN GETZENDANNER
United States District Judge

May 30, 1986

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 86-2032

WARREN LEE HARRIS,
Petitioner-Appellant,

v.

MARVIN REED, *et al.*,
Respondents-Appellees.

Argued Feb. 9, 1987

Decided June 12, 1987

REHEARING AND REHEARING EN BANC

Denied July 20, 1987

Before BAUER, *Chief Judge*, CUDAHY, and POSNER, *Circuit Judges*.

BAUER, *Chief Judge*.

Warren Lee Harris was convicted of murder in 1977 and received an indeterminate sentence of 50-100 years in prison. His conviction was upheld on appeal against a challenge to the sufficiency of the evidence. Harris filed both state and federal petitions for post-conviction relief. In his state petition for post-conviction relief, Harris alleged ineffective assistance of trial counsel. This

issue had not been raised on direct appeal. Harris' state petition for post-conviction relief was denied. The Illinois Appellate Court affirmed the dismissal of Harris' petition, although it is unclear whether the dismissal was based on waiver or the weakness of Harris' claim on the merits.

In his federal petition for a writ of habeas corpus in the United States District Court, Harris again claimed ineffective assistance of trial counsel. Although the state urged that Harris' failure to present the claim on direct appeal precluded the federal court from addressing the claim, the court found that the state appellate court had excused the procedural default by addressing the merits in denying Harris' petition for post-conviction relief. *United States ex rel. Harris v. Rivel*, 608 F.Supp. 1369 (N.D.Ill.1985). The district court then dismissed Harris' claim on its merits. We affirm the dismissal of Harris' petition without reaching its merits, since we conclude that the state court did not excuse the procedural default at issue.

I.

Harris was convicted of shooting Ernest "Pete" Howard on the west side of Chicago in 1977. Howard died before identifying his assailants. Harris was connected to the crime by the testimony of Antonio Slater who was driving down the block near the site of the murder. Slater testified that he heard a shot, saw Harris jump into a car and drive away past him. At trial, Harris was represented by Assistant Public Defenders Todd Mosberger and Kathryn Kuhlen. In the opening statement, the defense promised to show that two witnesses had identified a man named McWhorter leaving the scene of the crime. In fact, Alice Riles and LeRoy Carter had given statements to that effect to the police and were present, in the courtroom, prepared to testify for the defense. In the end, however, the defense presented no witnesses, resting on the belief that the state had

not proven its case against Harris beyond a reasonable doubt.

Harris did not claim ineffective assistance of counsel in his direct appeal.[1] In denying the petition for post-conviction relief, the state court noted that an issue is waived for purposes of post-conviction relief if it could have been raised on direct appeal. Typically, a claim of ineffective assistance of counsel cannot be raised on direct appeal because its resolution often requires evidence which is not contained in the record on appeal. Here, however, the state court found that all of the grounds presented to support the claim of ineffective assistance of counsel were sufficiently supported by the record to have been raised on direct appeal—with the exception of the ground alleging counsels' failure to investigate and present alibi witnesses. After noting this, the court proceeded to reach and reject some of Harris' claims on the merits—claims which he could have raised on direct appeal. The United States District Court held a three-day hearing to examine Harris' claim of ineffective assistance of counsel in his petition for habeas corpus relief and determined that Harris' claim should be rejected on its merits.

II.

The state urges us to find that the district court erred in ruling that Harris had not waived his right to present his claim of ineffective assistance of trial counsel by failing to raise the issue on direct appeal. Failure to raise an issue that could have been raised on direct appeal waives the issue for the purposes of post-conviction review. *People v. Edmonds*, 79 Ill.App.3d 33, 34 Ill.Dec. 555, 398 N.E.2d 230 (1st Dist.1979). An issue which precludes a state appellate court from addressing the

[1] It appears that Harris was represented on appeal by counsel from the State Appellate Defenders Office and was no longer represented by Assistant Public Defenders, thus making it more difficult to show cause for the failure to raise the issue on direct appeal.

merits of a claim, also precludes a federal court, on a habeas corpus petition, from addressing the merits of the claim. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). *United States ex rel. Sperlack v. Wolf*, 699 F.2d 354 (7th Cir.1983). If, however, the state court ignores the procedural default and addresses the claim on its merits, a federal court is not precluded from reaching the merits of the claim in a petition for habeas corpus relief. *United States ex rel. Williams v. Franzen*, 687 F.2d 944 (7th Cir. 1982).

As here, the defendant in *Williams* failed to present a claim on direct appeal, first asserting it in a state petition for post-conviction relief. Without addressing waiver, the state court reached the merits of Williams' claim. On habeas review, the district court noted:

> The policies underlying deference to a state procedural default are inapplicable where the state itself does not apply or enforce the rule. When a state court does not rely on a waiver of a constitutional claim, but goes beyond the alleged waiver to rule on the merits, a federal court can also reach the merits of the claim without the cause-prejudice standard of *Wainwright v. Sykes* being met.

Id. at 951. Thus, a state court's complete failure to note waiver allows a federal court to review the merits of a claim. In *Farmer v. Pratt*, 721 F.2d 602 (7th Cir. 1983), we addressed the effect of a state court decision which relied both on a procedural default and on the weakness of the appellant's claim on the merits. There we determined that when a state court relies both on waiver and a rejection of the claim on the merits—a federal court will respect the alternate *res judicata* grounds of the order and will be precluded from reaching the merits of the claim. *See also Phillips v. Lane*, 787 F.2d 298, 211 (7th Cir.1986).

The state appellate court order at issue here is distinguishable from the orders in both *Williams* and *Farmer*. In *Williams*, the court completely ignored waiver, while in *Farmer*, the court expressly relied, in part, on waiver. The state court here did neither. In examining Harris' post-conviction petition, the state court noted that failure to present an issue on direct appeal precludes post-conviction review unless the nature of the issue is such that it could not have been raised on direct appeal. The district court then examined the trial court record and found that all grounds, save that relating to the alibi witnesses, could have been presented on direct appeal. Without expressly finding that all other grounds were waived, the court then proceeded to a short discussion of general standards for judging a claim of ineffective counsel. Next, the court analyzed both trial counsel's failure to call alibi witnesses, as well as other grounds that could have been raised on direct appeal and concluded that Harris had received the effective assistance of his trial counsel.

The district court found the state court order analogous to that in *People v. Ross*, 63 Ill.App.3d 884 20 Ill.Dec. 688, 380 N.E.2d 897 (1st Dist. 1978), in which the Illinois Appellate Court noted a waiver problem but decided to examine the case on its merits. In *Ross*, however, the court explicitly stated its determination to ignore the procedural default. Here, we have no such clear expression of intent. There is neither an explicit finding of waiver nor an expression of an intention to ignore waiver. The order is ambiguous because the court addressed the merits of some of the petitioner's claims which it clearly implied had been waived.

While we do not require an explicit finding of waiver nor an explicit statement of intention to ignore waiver, it is clearly more helpful to include such language. In considering whether a state court chose to condone a procedural default, a reviewing court should try to as-

sess the state court's intention to the extent that this is possible. Upon review of the state court order, we find we must disagree with the district court in this regard. A full reading of the order suggests to us that the appellate court intended to find all grounds waived except that pertaining to the alibi witnesses. The court then proceeded, as an alternate holding, to reject Harris' claim on its merits. Under these circumstances, we find that the order was closer to that in *Farmer*, where the state court relied on alternate grounds for its finding. We cannot find that the state court intended to ignore the procedural default. Accordingly, we are precluded from reviewing the argument raised in the petition, and the order dismissing the habeas corpus petition is

AFFIRMED.

CUDAHY, Circuit Judge, concurring:

I write separately only to indicate my view that the ineffective assistance of counsel claim should not be treated as waived. As the majority notes, the Illinois Appellate Court made no express determination that the claim had been waived. The Illinois court considered the claim on its merits. Rather than attempting to divine the unspoken "intent" of that court, I think we should invoke a presumption that waiver not clearly found has been condoned. Waiver, particularly of an ineffective assistance claim on direct appeal, is an essentially technical ground for avoiding very difficult, very important and very close issues on the merits. Certainly it is within the state court's power to protect their procedural requirements merely by making express findings that a petitioner has waived.

Judge Getzendanner struggled with the important and difficult issues here and, after a hearing lasting three days, denied the petition. Although the matter is very close, I would support her determination and thereby reach the same result as the majority but by a different route.

SUPREME COURT OF THE UNITED STATES

No. 87-5677

WARREN LEE HARRIS,

Petitioner

v.

MARVIN REED, Warden, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to Question 1 presented by the petition.

March 7, 1988